United States Court of Appeals

for the Second Circuit

APPENDIX

74-2243

United States Court of Appeals

FOR THE SECOND CIRCUIT

PATRICK DEMAURO,

Plaintiff-Appellee,

—against—

CENTRAL GULF SS CORP.,

Defendant and Third-Party Plaintiff-Appellee,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellant.

APPENDIX

(Volume I—pages 1A to 316A)

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UNITED STATES COURT OF APPEALS
DEC 9 1974

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P. DE MAURO VS. C ENTRAL GULF SS CORP.

72 CIV. 630

DATE	PROCEEDINGS	Date Ord. Judgment
~~FEB14-72~~	~~FILED COMPLAINT. ISSUED SUMMONS.~~	
Mar 13-72	Filed summons with marshal's return. Served Central Gulf SS CO. BY Atkinson-claims mgr. on 2/25/72.	
APR 18-72	Filed ANSWER of defendant to complaint.	
APR 18-72	Filed Notice of taking deposition.	
Apr 19.72	Filed Third Party Complaint. Issued summons,	
Apr 19.72	Filed Pltffs. Interrogs.	
MAY 9-72	Filed third party summons with marshal's return. Served International Operating Co. Inc. by Mr.Nolan,VP on 4/24/72.	
May 15.72	Filed Pltffs. Interrogs. pursuant to the rule 33.	
May 31-72	Filed stipulation and order extending deft-3rd pty.pltfl's time to answer interrogs. to 6/9/72. So ordered. Cannella, J.	
AUG 1 72	Filed 3rd pty Deft's ANSWER to 3rd pty complaint. Third pty deft demands trial by jury.	
AUG 1 72	Filed " " " Notice to take deposition of pltff and Chief Officer aboard the SS Green Port on 3.31-72.	
AUG 1 72 c	Filed 3rd pty Deft's Interrrogs directed to 3rd pty pltff.	
AUG 15 72	Filed REPLY of the Deft-3rd pty pltff to the Counterclaim of the 3rd pty deft.	BEJH
AUG 21 72	Filed Deft-3rd pty pltff's Notice of motion ret. 8-29-72 for an order pursuant to Rule 26 (c) FRCP to vacating the third pty deft's notice of taking deposition.	
SEPT 8 72	Filed Pltff's REPLY to COUNTERCLAIM.	PAC
Aug.28-72	Filed Memorandum of Law in support of deft-3rd pty.pltf's.motion to vacate 3rd-pt.defendant's Notice of Deposition.	
Oct.16-72	Filed Memorandum of Law in opposition to deft-3rd pty.pltf's.motion to vacate 3rd pty-deft's.Notice of Deposition.	
Oct.16-72	Filed MEMO.END. on motion papers filed 8/21/72. Motion withdrawn. So ordered. Cannella,J.	
Dec29-72	Filed pltff's notice of motion Re: substitution of atty ret. 3-1-73.	
Mar.7,73	Filed MEMO.End. on motion filed Dec.29,72. Re: Substitution. Motion Granted No opposition. Submit Order. So Ordered. CANNELLA, J. (n7m)	
Oct. 5-73	Filed third-party deft. International Terminal Operating Co., Inc. interrogs.	
Feb. 26-74	(Received in chambers-2-25-74) Filed requests to charge of deft. and third-pty pltff., Central Gulf SS Corp.	
Feb.26-74	(Rec'd in chambers 2-25-74)- Filed memorandum of deft. and third-pty pltff. Central Gulf SS Corp.	
March 1-74	(Filed in court 2-28-74). Filed special verdict.	
March 1-74	(Rec'd in chambers 2-25-74) Filed trial memorandum of deft. and third-pty pltff. Central Gulf SS Corp.	
March 1-74	(Rec'd in Court 2-26-74) Filed third-pty deft's trial memorandum.	
March 1-74	(Rec'd in chambers 2-25-74). Filed deft. and third-pty pltff. Central Gulf SS Corp's requests to charge.	
March 1-74	(Filed in Court 2-27-74) Filed third-pty deft's additional requests to charge.	
March 1-74	Filed third-pty deft's requests to charge.	
March 6-74	Filed Judgment # 74,238-- ordered that pltff., Patrick Demauro, have judgment against the deft, Central Gulf SS Corp, in the amount of $200,000.00 and ordered that deft-third-pty pltff., Central Gulf SS Corp., have judgment over against the third-pty deft., International Terminal Operating Co. in the amount of $ 200,000.00. Clerk Entered 3-7-74 (m/n)	
March 7-74	(Rec'd in chambers 2-27-74)-Filed memorandum of law submitted by Dept. of Labor in support of motion to quash subpoena.	
March 7-74	Filed memorandum-the court is convinced that the sound exercise of its discretion is directed toward the vacatur of this subpoena. CANNELLA, J. (m/n)	
March 11-74	Filed third-pty deft's affdvt. of Albert V. Testa and notice of motion for an order for judgment notwithstanding the verdict. Ret. 3-27-74	
March 11-74	Filed affirmation in opposition to third partys defts motion for judgment	

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PROCEEDINGS

DATE	
h 28-74	Filed deft & third-pty pltff's affdvt. of John B. Shields in opposition to motion of third-pty deft. setting aside the verdicts.
r. 5-74	Filed Bill of Costs on Judgment # 74,238 taxed in the sum of $ 366.01
r. 8-74	Filed pltff's taxation of costs with notice of entry.
r. 9-74	Filed memo endorsed on motion filed 3-11-74. The within motion is denied in all respects. So ordered- CANNELLA, J. (m/n).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PATRICK DE MAURO, Plaintiff vs. CENTRAL GULF SS CORP., Defendant, vs. INTERNATIONAL TERMINAL OPERATING CO., Third Party Defendant.	Before: HON. JOHN M. CANNELLA, District Judge and a Jury
	72 CIVIL 136

New York, February 25,26,27,28, 1974

STENOGRAPHER'S MINUTES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PATRICK DE MAURO,

Plaintiff,

vs.

CENTRAL GULF SS CORP.,

Defendant,

vs.

INTERNATIONAL TERMINAL OPERATING CO.,

Third Party Defendant.

72 Civ. 636

BEFORE: HON. JOHN M. CANNELLA,

District Judge
And a Jury

New York, New York
February 25, 1974 - 10:30 A.M.

APPEARANCES:

ZIMMERMAN & ZIMMERMAN, ESQS.,
Attorneys for Plaintiff
BY: MARTIN LASOFF, Esq., of Counsel.

BIGHAM, ENGLAR, JONES & HOUSTON,
Attorneys for Defendant
BY: JOHN V. SHIELDS, Esq., of Counsel.

ALEXANDER, ASH, SCHWARTZ & COHEN,
Attorneys for Third Party Defendant
BY: (On 2/22 only): JOSEPH COHEN, Esq., of Counsel.
THEREAFTER: ALBERT V. TESTA

MR. LASOFF: May it please the Court. Mr. Shield, Mr. Testa, Mr. Tormey, Mr. Foreman, ladies and gentlemen of the jury. His Honor has made my job much easier by giving you this diagram. I don't have to go into it in detail. I just want to tell you before I start that I wasn't present when this accident occurred and neither were my opponents. What we are going to try to do now is tell you what we discovered by way of talking to the people who were there, by way of taking depositions of people who were there, by examining photographs that were taken by the United States Army right after the accident. So that we understand each other very clearly, the plaintiff in this case is only suing a ship. The ship in this case was the Green Port and it was owned by the Central Gulf SS Company. The ship, in turn, is suing the stevedoring company for whom the plaintiff works, International Terminal Operating Company, Inc., and they are saying that if they are responsible to the plaintiff, then then want to recover against International Terminal Operating Company because they didn't do their job the right way. As his Honor has said, that case doesn't come into existence until I win my case against the ship, or rather, Mr. De Mauro does. But so that you understand what is going to happen here, both the ship and the stevedore have a community of interest because obviously if Mr. De Mauro doesn't win,

then there is no other case. So that really for the purposes of this case it is the plaintiff against the ship and the stevedore. As least that is my contention. You may find otherwise.

MR. TESTA: If your Honor please, that is not the situation. The plaintiff is not suing the third party defendant.

THE COURT: Yes, but I think it is a fair statement for him to state that as far as he is concerned both of you are on the other side. That is what he is essentially saying and I think that is fair comment. You don't say that you are going to assist him in his case, do you?

MR. TESTA: What I am saying is that the plaintiff is not suing the third party defendant.

THE COURT: No, he is not. He is absolutely not suing the third party defendant but he says there is a community of interest here, and I think that is fair comment.

MR. LASOFF: Thank you, your Honor.

All right. Now, let's get to a day in March, 1971, March 31st to be precise. We go to Bayonne, New Jersey, to a place called the Military Ocean Terminal in Bayonne, New Jersey. As the name indicates, this is a facility of the United States Army. And at the time this accident occurred, as you know, the Army had worldwide commitments and these ships

would come in there and be loaded and discharged with Army cargo. This is why the Army has pictures right after this accident, or several hours after the accident, because the accident happened at that U. S. Army facility. Mr. De Mauro was working for the stevedoring company, as I called you, International Terminal Operating Company, and on this day he was sent to work on board this ship, the Green Port, in a double hatch. When I say a double hatch, that means that on the ship there were cargo spaces. These spaces in nautical terminology are called hatches. These are the openings in the ship into which cargo is loaded or discharged. It is like a big room. In other words, if you looked at that ship, obviously you go on the top of the ship. If you took part of the ceiling off and you looked down there would be a big room to put cargo in. That is where these men went to work. In this instance they went to work in a second deck. This ship had three decks. An upper 'tween deck, a lower 'tween deck and a lower hold. Each of these decks had covers on them. To go down lower you would have to take off the covers. To go up higher and put more cargo on top, you would have to put the covers on again. This accident happened in a lower 'tween deck of a trouble hatch. Four and five of one hatch. In other words, instead of having a bulkhead between these two hatches, these two hatches ran into each other, even though

they had separate openings as well, there wasn't a bulkhead or a wall between the two hatches. You couldn't put big cargo right through there. The hatch was twice as large as the usual hatch. From the records once again it would appear that the accident happened at hatch five. Number four was right next to it. Because of the fact that not many people here now remember whether the ship was docked with the face into the pier, the bow, or whether with the back out, you may hear somebody call it five or somebody call it four. But it pretty well said that it happened at the forward end of number five. What happened? These men had worked on the ship in the same hatch the day before at the upper 'tween deck level and they had discharged all the cargo from the upper 'tween deck level, had taken the hatch covers off and put a hilo machine, which is also known as a fork lift, it is a small motorized vehicle with blades that lift up and down which is used to move heavy cargo. They then came back to work at eight o'clock on the 31st of March and they took the hatch covers off or the pontoons at the main deck level, because you don't leave the hatch open overnight in case it rains or snows or anything happens, you cover it up when you go home either by means of canvas or a tent. And they went down into this hatch about a quarter after eight to start work. This ship had come into the Port of Bayonne to be discharged.

It was terminating a very long voyage that had gone many places. This was the port where everybody was signing off, the ship wasn't going any other place. The crew was going off, the ship was out of service for awhile. The ship did not come in fully loaded. It stopped at Norfolkand Charleston and Oakland and Balboa and other ports on the way here. I think no cargo was loaded in Charleston or Norfolk. They had just discharged some of the cargo and all of the cargo was going to be taken off ultimately in Bayonne. So that whatever was in that ship had been in the ship when the ship arrived and had to be taken out by the longshoremen who were hired by the stevedore who was hired by the ship to discharge this ship. In this half on the offshore side there was a cargo of pipe, long pipe which ran further than the length of one hatch apparently into the other hatch. I think it covered all of four and part of five. And on top of this pipe which was not flat pipe, which was round, for some reason or other, this ship came in with a cargo of cases, 700 pound cases stowed on top of this pipe. These cases were chocked or fenced on the side in hatch number four. There was no chocking or fencing on the side of number five where the men worked. Now, these men were engaged in discharging a forward bulkhead, when I say a forward bulkhead that would mean the front part of number five hatch which would be the

part closer to number four hatch, the aft part would be the part towards the back of the ship completely, by means of a hilo machine. What they were doing was taking out palletized cargo. Palletized cargo means cargo that you don't have to put into nets or you don't have to have pallets. It comes in on pallets already and all the machine does is go in, pick up the pallets, take it in the square of the hatch, the men hook up the cargo which was hooked to those pallets and it goes right out of the ship. Nobody had touched this cargo of pipe and the cases thereon from the time they went down in this hatch at about a quarter after eight, twenty after eight, until the time this accident happened, which was about 9:00 A.M. When this palletized cargo was taken out, there is some loose wooden lumber there and that has to be taken out of the way so the hilo machine can go in and take out the cargo. At the time this accident happened, Mr. De Mauro had picked up a piece of this loose wood or dunnage and was taking it aft toward the back of number five so it wouldn't block the hilo machine. All of a sudden he heard a word, "Look out," and these cases all came tumbling down and he was buried by these 700 pound cases. You will hear a description of how they had to get Mr. De Mauro out from under these cases. They couldn't be picked up, they were too heavy. They had to use two by four planks, one man had to go in between the cases and the

body and twist his legs and get him out of there. As a result of his being struck and buried by three of these cases he sustained a fracture of the femur, which is the thigh or hip bone of the right leg, and a fracture of the fibula, which is one of the bones in the bottom part of the leg. When the cases were taken off of him he was taken right out of the hatch on a stretcher and taken to Bayonne Hospital where he remained for 27 days. About 4:20 that afternoon they operated on Mr. De Mauro and put a steel pin in his leg so that the thigh bone would be held together, rather than immobilizing him in a cast for six months. And Mr. De Mauro from that day to this has not been able to work, and as you will hear testimony he will never be able to work as a longshoreman again. As his Honor has said, we bring our cause of action based on two rules of law, two systems of law. The general maritime law, the doctrine of seaworthiness or unseaworthiness, and common law negligence. When we say seaworthiness or unseaworthiness, we don't mean that the ship has a hole in the bottom and it is going to sink if it moves anywhere, and we don't mean that the engines don't work. What we say is that this ship came in with this cargo. Our men had nothing to do with this cargo. And our men were entitled when they went on board this ship, that this cargo should have been stowed properly so it didn't fall down without anybody

touching it. And as a result of that cargo not being stowed properly there arose a condition and the condition was the unseaworthiness of the vessel. Unseaworthiness is a condition rather than an act or failure to act. The minute that ship failed to properly secure those cases so that they wouldn't tumble down, remember these are 700 pounds each with no one touching them, that act we say made the ship unseaworthy. That created a condition that made the place of work not reasonably safe. And at the time this happened Mr. De Mauro was six to ten feet away from these cases and he was the closest one to these cases, so that nobody was in any way near these cases. Secondly we say that the defendant was negligent. In what way were they negligent? Once again they had a duty to see that those cases were stowed in a reasonably safe condition so that either seamen or longshoremen who had to work there would be safe from the risk of their toppling and hitting them. As we will show you from the pictures, as we will show you from the testimony, these were not adequately braced. In fact, on one side they were not braced at all. And they were stowed on a cargo of round pipe so that if anything moved in the slightest degree these cases would have to topple because they were not on a flat surface, they were on a round surface that tilted down. And these cases were stowed three or four feet -- three or four cases high. Not one. Three or

four cases high. So that you have a weight of some 21 to 28 hundred pounds braced on a fence, in the other hatch, nothing in the hatch in which these people worked. As you will hear from the testimony, Mr. De Mauro was making some seven or eight thousand dollars a year when this accident happened. The year before -- two years before, he had made about nine to ten, but he had an attack of the gout that year and he lost a couple of months of work. You will see that at the time this accident occurred, the hourly wage for longshoremen was $4.60 an hour, as of today the hourly wage for longshoremen is $5.95 an hour, and you will see also, maybe we can do this by stipulation, if not we will have a witness, that a longshoreman if he reports to work everyday is guaranteed 40 hours of work 52 weeks a year. As of today his rate is $238 a week. We claim not only past wages loss, we claim future wages lost. Mr. De Mauro is now 47 years of age. It is generally conceded in this industry that 65 is normal retirement age. So he has eighteen more years of future lost wages. You will see extensive hospital bills, extensive medical bills. We also make claim for past pain and suffering, that is pain that this man endured from the day of the accident until the day you go out and deliberate. You will look at the hospital record and you will see the medications that he was given there and hear his testimony

as to the others. We also claim that this man will endure in the future pain and suffering. We also claim that as a result of this accident Mr. De Mauro has lost 45 percent of the use of his right leg and that this is permanent and that it will never get any better. As you can see I am not talking in small numbers here, and I am not going to ask you to make a small decision. I ask you to listen to the evidence as the witnesses tell it to you. There will be exhibits offered in evidence, there will be photographs offered in evidence. When I finish you will have a chance to listen to Mr. Shields who represents the ship and to Mr. Testa who represents the stevedore. I ask that you hold me to what I say. Hold them to what they say. I ask merely that you listen to this case. I am not trying to convince you of the merits of anything right now, because I wasn't there and nobody else except the gentlemen in the back of the room were. Thank you.

MR. SHIELDS: Your Honor, ladies and gentlemen of the jury. I represent the owner of the ship. I am the only one, or my shipowner is the only one who could not have anybody in hold number four or five on the day of this accident. The log book indicated based on the report that the accident happened in hatch number four. They say now it is in hatch number five. The plaintiff and his friends

all of whom will testify, were there. They are experts in the field of stevedoring and when a vessel comes into port the ship's crew has nothing to do with it except a general overseeing of how the job was progressing. But they can't interfere with the longshoremen. The third party defendant, International Terminal, was also there through the person of the plaintiff and his friends. So insofar as exactly what happened is concerned, I as the shipowner am at a disadvantage. I only know what the plaintiff and his friends say. And I would ask that all of you listen with the utmost care to the details of their testimony because I believe, based on what I have been able to gather, that if the vessel is at fault, which we don't concede, if the vessel was at fault it was because of something that the longshoremen did or did not do. I can't elaborate, but I ask that you listen very closely to the detail and when the evidence is all in I will have another opportunity to address you and at that time I believe I will be able to show you very logically that it was not the fault of the ship that caused this accident. We don't contest that Mr. De Mauro suffered an injury. He did. He suffered a fracture of the femur and of the other bone in his leg. That is not a pleasant thing. I certainly wouldn't want it. But the extent of it we do contest. And here again this will be brought in by medical testimony. So please listen very, very

carefully. That is all I have to say. Thank you very much.

MR. TESTA: Your Honor, Mr. Lasoff, Mr. Shields, Mr. Foreman and ladies and gentlemen of the jury. I haven't had the pleasure of meeting you before and you may wonder what I am doing here because Mr. Cohen of my office was present during the jury selection but unfortunately he could not be here today so I am representing the third party defendant in this case, International Terminal Operating, Co., Inc. My name is Albert V. Testa. Usually at this stage of a case I have to go into an elaborate explanation of what I am doing here. But I was very fortunate that Judge Cannella explained the whole thing for you on the blackboard. Because when I get up here I usually say that I represent a third party defendant and that the plaintiff is not suing my client. I think it is pretty obvious, in fact it is crystal clear from the diagram that the judge has drawn that the plaintiff in this case, Mr. De Mauro, is only suing the shipowner, and he is not suing International Terminal Operating Co., Inc., whom I represent. As a matter of fact, he worked for International Terminal Operating Co., Inc., at the time this accident happened. From this point forward I am going to call them I.T.O. because it is very difficult to keep saying International Terminal Operating Co., Inc., so whenever I say I.T.O. I am referring to the party I represent. As I said before and as the

judge graphically said to you, Mr. De Mauro is not suing I.T.O., he is not looking for any money from I.T.O. He is solely and only suing the shipowner in this case on two grounds. He is suing them for damages that he says he sustained on a certain date while he was working on the ship as a result of the negligence of the shipowner and the unseaworthiness of the vessel. And he is saying that they are responsible for the accident and for the injuries that he sustained in this case and he wants money from them. There are two cases here and again this blackboard diagram will be very handy for you because you can see that there are two separate and distinct actions here. Number one is Mr. De Mauro's case against the shipowner and number two is the shipowner's claim against I.T.O. In claim number one Mr. De Mauro is saying I want money damages. You, Mr. Shipowner, were negligent, your ship was unseaworthy and it was because of your negligence and the unseaworthiness of the vessel that I was hurt and I want money from you. The ship owner says no, we were not at fault, we were not negligent, we are not responsible for this accident. And in this case the shipowner wears two hats. Having said this and taken this position he then turns around and says well, even though we say we were not negligent we were not at fault, we were not responsible for this accident if by any chance you members of

the jury decide that we were negligent, that our ship was unseaworthy, that we were responsible for this accident, then we would like to shift the responsibility for the whole thing to the stevedore because we say the stevedore didn't perform the contract and in some way did not unload this ship in a workmanlike manner. Of course, we deny this. We say we did perform the contract, we did unload this ship in a workmanlike manner. And if by any chance you ladies and gentlemen decide that Mr. De Mauro is entitled to money from the shipowner, the shipowner is not entitled to get that money back from our client, because I say to you now and I am going to say to you throughout this case and at the end of this case, the stevedore does not belong in this case and should not have been brought into this case. However, everybody has a right to sue anybody else and to make claims. But they have the burden of establishing a claim. They have a burden of proof on the claim. What did Mr. Lasoff tell you? Incidentally, we spoke to you in a certain order here. Mr. Lasoff spoke to you first. Mr. Shields spoke to you second and I am speaking to you last. At the end of this case the order is going to be reversed and I am going to speak to you first, Mr. Shields second and Mr. Lasoff will speak to you last. The reason for that is that Mr. De Mauro has the burden of proof on his case against the shipowner. He has the burden of proving that the shipowner was

negligent or that the vessel was unseaworthy. And the shipowner has that same burden of proof in his case against the stevedore. The shipowner has the burden of proving that the stevedore did not perform its contract or did not unload this ship in a workmanlike manner. Sure, I.T.O. is a contract stevedore. We were there to unload the ship and we did unload it in a workmanlike manner. And I.T.O. did not do or failed to do anything which in any manner, shape or form contributed to the happening of this accident. Mr. Lasoff told you that this cargo was put in this ship somewhere else. I.T.O. did not put this cargo on the ship. We were there for the sole purpose of removing the cargo from the ship. The pipe was put there somewhere else by some other stevedores. These cases were put on top of this pipe in some other port by some other stevedoring company. They had the duty and obligation of stowing this cargo properly, not my client. This ship belonged to the shipowner. They had the duty and obligation to seeing this cargo was properly stowed in the first instance, wherever it was put on the ship. And we are told by Mr. Lasoff that it was not properly stowed, that it was put there, 700 pound cases on top of some pipes, which, of course, are round, and was not put on a level flooring, and that these cases fell on top of Mr. De Mauro. I say to you, members of the jury, that this is not our fault and not our responsibility. It is

their ship, it was improperly stowed, it fell on Mr. De Mauro, it is their fault, and they can not shift that responsibility to my client who was there for the sole purpose of unloading this cargo, and as Mr. Lasoff told you, never touched these cases at any time before they fell on Mr. De Mauro. We make opening statements to you. You don't have to take my word for it or Mr. Lasoff's word or Mr.Shields' word for what happened. These are contentions. These are things that we hope to prove and these are our respective positions in the case. But I say to you on the basis of what plaintiff's claim is, on the basis of what Mr. Lasoff said plaintiff's claim is in this case, that my client, I.T.O., does not belong in this case, and at the end of this case I am going to ask you to come back and let them out. In the meantime I am asking you to listen carefully to the testimony, listen to everything that the witnesses say on the stand and do not form any conclusions until you have heard all the testimony in the case and until you have heard the law as Judge Cannella gives it to you. Thank you.

MR. LASOFF: Mr. De Mauro, would you take the stand please?

P A S A Q U A L E D E M A U R O, called as a witness by the Plaintiff, having been first duly sworn, was examined and testified as follows:

Q Mr. DeMauro, would you keep your voice up so I can hear you back here?

A Yes, sir.

Q Do you remember the 31st day of March, 1971?

A Yes.

Q Did you meet with an accident on that day?

A I did.

Q Were you working when that accident occurred?

A Yes.

Q Where were you working?

A Bayonne, Ocean Military Terminal.

Q Military Ocean Terminal?

A Yes.

Q Who were you working for?

A International Terminal Operating Company.

Q Were you a longshoreman?

A Yes, sir.

Q Were you working on board a ship when you were injured?

A Yes.

Q Do you remember the name of that ship?

A Green Cove -- Green something or other.

Q Green Port?

A Green Port.

Q Do you remember what hatch you were working in?

A Number four hatch, I believe.

Q Is that a double hatch?

A Yes.

Q Would four and five be one continuous hatch?

A Yes, sir.

Q When for the first time did you work on that ship that voyage?

A The previous day.

Q What hatch had you worked in the previous day?

A The same hatch in the upper level.

Q The upper 'tween deck level?

A Yes.

Q Had any cargo been discharged from the lower 'tween deck on that previous day?

A No.

Q Had the lower 'tween level been opened up the previous day?

A We opened up.

Q What else did you do besides opening hatch?

A Put a hilo into the hatch?

Q What is a hilo?

A A tow motor, a machine for picking up cargo and bringing it to the square of the hatch so it can be hooked up and

taken out.

Q Is this also known as a fork lift machine?

A Yes.

Q Does this machine have blades on it?

A Yes.

Q Do these blades go up and down?

A Yes.

Q Do you remember what kind of a hilo, gas or electric, was being used that day?

A It was gas.

THE COURT: Mr. DeMauro, sit back and relax.

THE WITNESS: Thank you.

Q What time did you report to work on the 31st of March, 1971?

A 8:00 A.M.

Q Who was your hatch boss on that date?

A Walter Mink.

Q Was he your hatch boos on the 30th of March as well?

A Yes.

Q When you reported to work at 8:00 A.M. where did you go?

A Went to the ship, by bus.

Q Where do you report to work?

A To the Green Port, either number four or number five

Q Before you get to a bus, I am asking you.

A The terminal.

Q Is this a big terminal?

A Oh, yes. Very big.

Q And you get taken to the ship by a bus?

A Right.

Q Your whole gang was with you?

A Yes.

Q When you went on board the ship, what hatch did you go to?

A Four. Four or five. Either one of the ends, I don't know. But we opened up the hatch.

Q Do you remember how the ship was docked?

A No.

Q Is that why you can't say either four or five?

A That's right.

Q When you first went on the ship, what time was that?

A About five or ten after eight.

Q That was the time the bus got to the pier where the ship was docked?

A Yes.

Q When you got on the ship at five or ten after eight, what had to be done at the main deck level?

A We had to take the pontoons off, the large steel.

Q When you say pontoons, are these large metal plates that cover the main deck level?

A Yes.

Q Are they taken off by means of the ship's winches?

A Yes, sir.

Q After the pontoons were taken off, did you go down to the upper 'tween deck?

A Yes.

Q At the upper 'tween deck level had you left the hatch covers off the day before?

A Yes. We put a hilo down, we had to leave them open.

Q So that you could go straight down?

A Yes.

Q Did you commence work in the lower 'tween deck level?

A Yes.

Q What kind of work was going on in that hatch?

A We were removing palletized cargo with the hilo.

Q That would be a discharge operation?

A Yes.

Q And the day before in the upper 'tween deck, was that also a discharge operation?

A Yes.

Q Was there any cargo to be loaded on this ship at Bayonne?

A No.

Q Where was this palletized cargo that you were going to discharge?

A Across the after end of the hatch of four or the forward end of five.

Q Once again. When you say across the hatch, that would mean across the width of the ship, is that right?

A Right.

Q Or what we would call in maritime language athwartship, correct? This cargo was not stowed fore and aft, running the length of the ship, that you were discharging?

A No.

Q Besides this palletized cargo which ran fore and aft was there other cargo in that hatch?

A Yes, there was steel pipe.

Q Which way did the steel pipe run?

A That ran fore and aft.

Q Was all of that pipe in the hatch you were working in or did it extend beyond the hatch?

A It extended beyond the hatch.

Q Was there anything stowed on top of the steel pipe?

A Yes, wooden cases.

Q How many wooden cases did you see?

A Three or four.

Q Were they stowed on top of each other?

A Yes.

Q Did you see anything holding these cases in your hatch in place?

A No.

Q You have already said the accident happened around nine o'clock. What were you doing just before this accident happened?

A I had picked up a piece of dunnage, that is heavy log, wood that was in between the palletized cargo and I was taking it over out of the way of the machine so the machine wouldn't run over it, and somebody yelled and the cases fell.

Q You used the word "dunnage." Is that scrap lumber that is used?

A Generally, yes.

Q That is used as flooring to separate cargo?

A Yes.

Q You said somebody yelled.

A Yes.

Q Do you know who yelled?

A No.

Q When they yelled what did you do?

A I turned around and I seen the cases coming. I tried to get out of the way but I couldn't. It was too late.

Q Did you do anything with regard to any of the cases?

A Well, I saw when they were coming down I put my arm up like this as I fell and one of them rolled over my arm. But the other three, there was three there, that fell on top of me.

THE COURT: Let the record indicate when he was talking about his arms, he was using his right arm over his head.

THE WITNESS: That's right.

Q Where the cases were stowed, was that a height over your head?

A Yes, sir.

Q Was that up almost into the deck above, of the hatch, the 'tween deck level?

A Yes.

Q The upper 'tween deck level?

A Yes.

Q How close were you to these cases when they fell?

A About six to eight feet.

Q When they fell, how many of these cases landed on top of you?

A Three.

Q After the cases and you came to rest, where were the cases?

A On top of me.

Q Could you get out of there by yourself?

A No.

Q Were you conscious after?

A I was out for a couple of minutes. A short time.

Q Do you recollect how you were gotten out from these cases?

A The men were around me, they were prying the cases up. I heard them saying, "Don't move, don't move." And I don't remember anything too much else. And they got me out from under and took me out of the hatch.

Q Had you at any time that morning or the day before ever touched or gone near those particular cases or pipe?

A No.

Q Had you seen any other longshoremen down there in that hatch go near or touch that pipe in any way?

A No, sir.

Q You said there was a hilo machine being used in that hatch, correct?

A Right.

Q At the time this accident happened and these cases

fell, how far away was that hilo machine from that pipe and those cases?

A About fifteen feet.

Q What was the hilo machine doing at that time?

A Going back in to pick up another draft of cargo.

Q It was going back into the stow in either the aft end of four or forward end of five to pick up that palletized cargo that was stowed atwartship?

A Right.

Q Nowhere near this pipe or these cases that fell?

A No, sir.

Q After they got these cases off you, what happened to you next?

A What happened what? I didn't hear you.

Q What happened after they got the cases off?

A They put me on the stretcher and took me out of the hatch.

Q Was this done by means of the ship's cargo winches and booms?

A Yes, sir.

Q Where did they take you from the hatch on this winch? Did they put you on the dock or in an ambulance?

A On the dock and then they put me into an ambulance.

Q Where did this ambulance take you?

A Bayonne General Hospital.

Q Do you know what time you got to the Bayonne General Hospital?

A About a quarter after nine, twenty after nine. It was very early, I know.

Q What did they do for you there?

A Took me into the emergency to look at me and then they waited for a -- for the company's doctor.

Q That would be I.T.O.'s doctor?

A Yes. And then he came and told me they would have somebody to take care of me as soon as they could get them. So I stayed in the waiting room, the emergency room until about three o'clock and then they put me in a hospital bed and around 4:30 they took me to the operating room.

Q What did they do in the operating room?

A First they tried to giveme a spinal and they don't get me, my back to bend far enough to make the spinal go in, so they had to give me a general anesthetic. After that I don't know what they did. I woke up in the intensive care. They puta pin this long from my hip to the knee, through the bone.

Q How long did you stay in the hospital?

A Twenty-four days.

Q How did you feel after you came out of anesthesia

after the operation during the time you were in the hospital?

A A lot of pain, very much pain.

Q Did they give you anything for pain?

A Yes.

MR. LASOFF: At this time, your Honor, I'd like to offer into evidence the Bayonne hospital record and the emergency room record, and also a certified bill from the Bayonne hospital.

MR. SHIELDS: I have no objection.

MR. TESTA: No objection.

(Plaintiff's Exhibits 1 and 2 were received in evidence.)

xxx

Q Am I correct, Mr. DeMauro, that they did not put your leg in a cast after that pin was put in?

A No, they just bandaged it.

Q Did there come a time in the hospital when you were taught how to ambulate, walk, in other words?

A Yes.

Q How did you do that?

A Well, they took me down to the therapist and I had to get up on bars and walk without putting any weight on that leg at first, and then gradually he said you can put weight on it now. But it hurt like hell -- sorry.

THE COURT: You don't have to be sorry about that.

We have heard of hell before. Fortunately I have never been there.

Q Mr. DeMauro, did they give you a device known as a walker?

A Yes.

Q Would you describe what a walker is, to us?

A It is an aluminum framework with four legs on it and you hold onto the handles and you walk in between. You use it as support.

Q Did they also give you crutches?

A Yes, sir.

Q How did you leave the hospital?

A In a wheelchair.

Q Did you take your walker with you?

A Yes, sir.

Q Did you take your crutches with you?

A Yes, sir.

Q How long did you use crutches after you left the hospital?

A Two or three months.

Q Incidentally, do you know the name of the doctor who performed this operation at the Bayonne hospital?

A Dr. La Peluso.

Q This doctor, is he a doctor who practices in Bayonne,

New Jersey?

A Yes, sir.

Q Incidentally, Mr. DeMauro, you live in Staten Island, do you not?

A Yes, sir.

Q And did at the time of the accident?

A Yes.

Q After you came out of the hospital did you come under the care of any doctor?

A Dr. LaPeluso.

Q What was he doing for you? I am saying while you were on crutches, let's limit it to that.

A I'd have to go to visit him every week or so. One time was one week, the next time was two weeks and he took X-rays, that's all.

Q How did you feel with regard to pain during this two or three months that you were on crutches?

A I had a lot of pain. Excrutiating, sometimes.

Q Words of art. Was that sharp or dull pain?

A Well, I always have a dull pain, I sometime have a dull pain --

Q I'm not talking about now.

A I had a sharp pain from my hip to my knee.

Q After you finished with the crutches, did you use

some other artificial appliance to walk?

A A cane.

Q Who gave you that cane?

A I had it myself.

Q Had Dr. LaPeluso or the hospital given you the crutches?

A The hospital.

Q How long did you use a cane?

A A little more than two months.

Q How did your leg feel while you were using the cane?

A Not too good.

Q Incidentally, which leg is this that we are talking about?

A Right.

Q Incidentally, when this stuff fell on you, these cases, besides your right thigh and your right leg, did you hurt any other parts of your body?

A I had bruises on my chest and my arm.

Q Did they heal without any incident?

A Oh, yes.

Q Don't bother you now?

A No.

Q Did it bother you a month after the accident?

A It was very sore.

Q For how long did it continue bothering you?

A All the time I was in the hospital and a couple of weeks after.

Q Five or six weeks?

A Yes.

Q And then it got better?

A Yes.

Q Doesn't bother you at all now?

A No.

Q Did there come a time when you went back to the Bayonne General Hospital?

A Yes. A year later -- not quite a year later.

Q February 27th, approximately?

A Exactly.

Q '72?

A Right. To have the pin removed.

Q So they had to operate again to take that steel pin out?

A Right.

Q I think they called it a nail, didn't they, rather than a pin?

A I don't know if they called it a nail, but it was that long. I will bring it in tomorrow.

Q How long were you in the hospital at that time?

A A week.

Q When you came out of there did you walk with any sort of device or were you able to walk without anything?

A I had the crutches for awhile.

Q How long?

A About two weeks.

Q Then were you able to walk without an artificial device?

A Yes.

Q You didn't use the cane?

A No.

Q How did you feel after they took the pin out, during that two weeks you were on crutches?

A It hurt.

Q How much?

A Well, I was in a lot of pain and it was a little tough walking because it was sore.

Q Incidentally, Mr. DeMauro, have you ever hurt that right thigh or right leg in any accident before this?

A No.

Q Have you hurt it in any accident since this?

A No.

Q Can you tell us your date of birth?

A November 11, 1926.

Q What was the state of your health prior to this accident?

A Good.

Q Can you tell us how much you made in the year 1969?

A About eight thousand --

THE COURT: I thought you said you were going to talk and see if you can stipulate.

MR. LASOFF: To future loss of earnings, your Honor, not past. The future is set, the past isn't.

THE COURT: All right.

Q I'm not talking about the year before the accident, I am talking about '69, two years before the accident.

A Close to $10,000.

Q How much did you make in '70?

A About six or seven thousand dollars.

Q Was there some reason for that?

A Yes. I got chronic gout in my foot and I had to lose a lot of time. I couldn't walk.

Q Your left leg?

A My left leg and left knee.

Q Incidentally, had that cleared up at the time this happened?

A Yes.

Q You had no more trouble with gout?

A No.

Q How long were you under Dr. LaPeluso's care?

A Until April of '72.

Q Did you then come under the care of another doctor?

A Yes. Dr. Pettey.

Q Is that Dr. Eugene Pettey?

A Right.

Q Is he in Brooklyn?

A Yes, sir.

Q What did Dr. Pettey do for you?

A He examined me, keep a check on it, tell me what to do, you know. Do exercises mostly.

Q Incidentally, in November of 1973 were you examined by a Dr. George Seaman?

A Yes.

Q On November 20, 1973, were you examined by a Dr. Murray Burton on behalf of the steamship company?

A Right.

Q And just last week, I believe, were you examined by a Dr. David Graubard?

A Yes.

Q Would it be correct to say that you have not

received any physiotherapy or other treatment except medication since Dr. LaPeluso?

A Yes, that is true.

Q How do you feel now?

A I still have pain. I can't pick anything up, I can't bend down --

Q Why can't you bend down?

A My hip hurts. If I try to bend down I get a cramp in my thigh and I have to straighten up.

Q In order to pick up something as a longshoreman, do you have to bend?

A Oh, yes.

Q Incidentally, what was your category as a longshoreman before this accident?

A A holdman.

Q The jury I don't think knows what is involved in a longshore gang. Can you tell me the three different classifications of longshoremen in a longshore gang as it existed in March of 1971?

A Yes. Dockman, deckman and holdman.

Q Incidentally, that still is the same three categories today, is that correct?

A Yes. To my knowledge.

Q Were you in a regular gang?

A Yes.

Q This was a regular gang at the Bayonne Military Ocean Terminal?

A Yes.

Q What does a deckman do?

A Runs the winches that lift the cargo out of the hatch.

Q This is the cargo machinery of the ship that works on electricity or power?

A Correct.

Q He doesn't do manual labor as such.

A No.

Q What does a dockman do?

A He is on the dock and he hooks up the cargo that goes into the ship or if he has to do any loading of pallets or something like that, he does that.

Q What is the heaviest classification of labor in the longshore gang?

A A holdman.

Q What does a holdman do?

A Discharges cargo, has to, a lot of times you have to make the cargo up, it is loose. But nowadays everything is palletized or strapped on something. But if it was loose you have to handle it, put it on pallets.

Q Do you have to pick up the cargo?

A Yes.

Q Do you have to also load ships?

A Yes.

Q When you load ships do you have to take the cargo into the wings or the forward and aft end where it is supposed to go?

A Yes.

Q Does this cargo at times weigh several hundred pounds?

A Sometimes.

C Does it weigh several thousand pounds?

A If it does they use a machine.

Q But for a couple of hundred pounds they use men?

A Right.

Q What else bothers you now besides the fact that you can't bend?

A I have trouble when I walk, up and downstairs, sit too long, stand up too long.

Q What happens if you walk more than a couple of blocks?

A My leg starts to hurt. The muscle on my thigh here tightens up.

Q If you did nothing, if you just sat down for a week, would you have any pain in that leg?

A Yes.

Q What kind of pain?

A Dull pain.

Q If you do walk a few blocks or if you do stand up, what kind of pain do you have?

A After awhile it gets severe.

Q Incidentally, holdmen work in the hold of a ship, is that correct?

A Yes.

Q How do you get to the hold of the ship, how do you get to the hold?

A You have to go down a ladder.

Q From the main deck level to the bottom of the lower hold, would it be fair to say that that is about 60 feet?

A Somewhere in that.

Q And you would have to go down a ladder some 60 feet to get to work?

A Yes.

Q If you got to the 'tween deck level that would be 25 feet above that?

A Yes.

Q Is there any way to get to work in the hold of a

ship except to go down a ladder?

A No.

Q Can you go up and down ladders?

A No.

Q Incidentally, how long have you been a longshoreman, Mr. DeMauro?

A Twenty years.

Q Tell us when you first became a longshoreman.

A 1948.

Q So if we count it up to the time of the accident that would be about 23 years?

A I was just counting the time I worked.

Q It would still be 23 years?

A Yes.

Q Any other thing that you know of that bothers you with your leg at the present time?

A No, sir.

Q Are you receiving any treatment for your leg at the present time?

A No.

Q Incidentally, Mr. DeMauro, at the time of your accident what was the hourly wage for longshoremen?

A $3.60 an hour, I believe.

Q $4.60?

A $4.60.

Q What is the wage now, if you know?

A $5.95.

MR. LASOFF: I offer into evidence, your Honor, this document from the New York Shipping Association which lists the hourly wages of longshoremen from 1960 until '73. The current year is not in here, but it should be known to all of us.

MR. SHIELDS: I have no objection.

MR. TESTA: No objection.

xxx (Plaintiff's Exhibit 3 received in evidence.)

Q Mr. DeMauro, after the accident do you have any recollection of how the stuff looked that had fallen where you were?

A After it fell?

Q After it fell and you were covered.

A I was about three or four feet from the square of the hatch and the cargo was laying on top of me.

Q I will ask you, if I show you some pictures could you identify them as the scene as it was when it happened, would you know the scene that well?

A No, I really wouldn't.

Q All right.

MR. LASOFF: You may inquire.

THE COURT: We will take a five minute recess and continue on. Please don't discuss the case with anyone. Keep your minds open.

(The jury left the courtroom.)

(Recess)

(In Open Court - Jury Present)

CROSS EXAMINATION

BY MR. SHIELDS:

Q Mr. DeMauro, how tall are you?

A 5-5.

Q How much do you weigh?

A 230 pounds.

Q How long have you been carrying that kind of weight?

A Oh, for years.

Q You mentioned two doctors, Dr. Pettey and Dr. LaPeluso. Didn't they suggest that in order for you to get better you should lose weight?

A They told me to lose weight. I did, then I put it back on again.

Q Dr. LaPeluso suggested that you get physical therapy?

A No, sir.

Q Did one doctor suggest that you go for physical therapy to improve your condition?

A Not to my knowledge -- wait a minute. I.T.O. sent me to a doctor in Brooklyn, Goldberg --

Q You mean I.T.O.'s doctor?

A Yes. But they didn't recommend. They told me to go there for an examination. When I got there he wanted to give me treatment three days a week and it took two and a half hours to get there.

Q You didn't follow up on that?

A No, I told him I'd take the therapy but closer to home. I couldn't make that trip three days a week.

Q But you didn't?

A No.

Q You didn't get physical therapy closer to home?

A No.

Q You didn't lose weight except for a very short period of time and then you put it back on again?

A No, I lost it for quite awhile.

Q How long?

A About a year.

Q And you put it back on again?

A Yes.

Q And you were told both of these were important for your recovery?

A I wasn't told nothing about the physical therapy

being important.

Q On the day of the accident, March 31, 1971, was your hatch boss Walter Mink down in number four lower 'tween deck?

A No, sir.

Q Was he there at any time?

A Yes, after I got hurt.

Q Had he been down in number four lower 'tween deck the day before the accident?

A No.

Q Had anyone from I.T.O. other than you and your fellow workers been down in any part of number four hatch on the day before the accident or the day of the accident, before the accident?

A I think the stevedore was down the day before and told us to clean out all the palletized first before we started on the pipe with the cases on top.

Q Who was that?

A I'm not sure. Someone from I.T.O.

Q Some supervisor or some big boss?

A The stevedore for the ship. I think it was Patty Mazzicola.

Q What was his title?

A He is a stevedore. Hatch foreman, ship's foreman.

Q He is the ship's foreman, he is in charge of all of the stevedores or all of the longshoremen on the ship?

A Yes.

MR. TESTA: I am going to object to this type of testimony from counsel, your Honor.

THE COURT: Sustained as to form. Strike out the answer.

Q What is that gentleman's position, or what is his job on the ship?

A To see that you take out the right cargo.

Q Throughout the entire ship?

A Not always. They had switched them around. If the ship is in a few days they might put a different stevedore on the following day. They got a big operation there.

Q What do you call him, the ship's foreman?

A Yes, ship's foreman.

Q But there is also a ship's foreman from I.T.O. on board the ship directing the discharge, is that correct?

A Yes.

MR. TESTA: If your Honor please, I am going to object to counsel testifying.

THE COURT: Sustained to form.

MR. SHIELDS: Your Honor, this is cross examination and the witness has so testified.

THE COURT: Yes, but it isn't cross examination as far as he is concerned, but this impinges on your contract action and that is what he is trying to develop. I don't know why you need leading questions. He can answer the questions without them being leading in form.

Q Isn't it a fact, Mr.DeMauro, that on the day before, on March 30th, you and your gang had discharged all of the cargo in the lower 'tween deck on the inshore side?

A No, I don't think so. We worked in the upper 'tween deck.

Q Do you recall coming to the office of Alexander, Ash and Schwartz, the attorneys for the stevedore on July 26, 1973, and testifying?

A Yes.

Q And do you recall on that day being asked the following questions and giving the following answers -- last page, sir.

MR. SHIELDS: Page 42.

Q Starting with line six, which is an answer:

"The day before.

"Q Then you had discharged some cargo?

"A Yes, we worked in that hatch.

"Q I.. the lower 'tween?

"A Yes.

"Q So that when you went down into the hatch on Wednesday, was there any cargo still on the inshore side?

"A No.

"Q That was clean?

"A Yes.

"Q Is the only work you did in the lower 'tween the day before, which would be Tuesday, removal of the palletized cargo from the inshore side?

"A I don't remember. I really don't remember."

Skip to question 22.

"Q Had you handled any cargo from the offshore side on the day before?

"A No."

Does that refresh your recollection?

A I don't recall working cargo on the inshore side on the day before, but I don't think there was any there.

C Were you, yourself, down in the lower 'tween deck the day before?

A Yes.

C Did you observe what cargo was in place?

A It was palletized cargo across the hatch.

Q Athwartship, or from side to side?

A Side to side.

Q What other cargo was there?

A Pipe and cases on it.

Q That was on the offshore side?

A Yes.

Q What was on the inshore side?

A I don't recall. I don't think there was anything there.

Q Was there a reason that you couldn't see the full length of the pipe as stowed on the offshore side?

A There was a fence up between the four and five hatch.

Q What is a fence?

A A temporary bulkhead, boards, they put planks up and nail wood to it to separate the two hatches.

Q So in effect there was a separation between number four and number five hatch?

A Yes.

Q Was there just one tier of these wooden cases, these three or four cases on top of the pipe?

A I think there was two.

Q But only one tier fell over?

A No, they all fell.

Q Only four boxes fell.

A Well, there was one tier then.

Q And the four boxes were piled one on top of the other?

A Yes.

Q And that on top of the pipe?

A Yes.

Q How far were those three or four wooden cases from that wooden fence that you described?

A They were up against it.

Q What was behind the wooden cases?

A What was behind them? The temporary wall.

Q What was on the other side? What was in front of the cases?

A Nothing.

Q The whole side of the ship was empty?

A Yes, except for the dunnage that we were piling up behind the pipe.

Q The dunnage wasn't there when you came down in the morning, you brought it there yourself?

A We brought it there, yes.

Q So that this one tier of boxes was standing free on top of the pipe?

A Right.

Q And that is exactly the condition you found it in at the time you came board on the morning of the accident?

A Yes.

Q And it remained that way until for some reason,

without anybody touching it, it fell?

A Right.

Q And struck you. And neither you nor anyone from your gang went anywhere near it?

A That's right.

Q How high were the pipes piled?

A About three and a half, four feet.

Q How far out from the side of the ship did they come?

A About four feet.

C Were they stowed evenly?

A No, they were like a pyramid.

Q Pardon?

A Pyramid, sort of. They were bundled pipe. You can't stow pipe square.

Q There was bundle upon bundle?

A Yes.

Q Piled about four feet high and about four feet out from the side?

A Yes.

Q Was the top of the bundles of pipe more or less even?

A No.

C Describe it for me, if you can.

A They weren't even. I mean, how else can you describe it? There was pipe, they started out down here, they can't keep them square because they didn't have them lashed in. They had them just tiered on top of each other.

Q Was that obvious to you?

A Yes.

Q You could see it just at a glance?

A Yes.

Q Did you see anything holding the boxes in place on the after side of the boxes themselves?

A The after side, that is where the fence was.

Q I'm sorry. On the forward side.

A No, nothing.

Q At the time of your accident or immediately before, was there any movement of the ship? Did it list or turn?

A No, not to my knowledge.

Q You were on the offshore side?

A Right.

Q Do you know whether the ship was docked with its left side to the dock or its right side to the dock?

A No.

Q You are down in this sort of cabin, you don't know which direction is which?

A Sometimes you do. I didn't know this time. I

didn't pay attention to whether we were in four or five.

Q But you know you were working, that the stuff was stacked offshore?

A Offshore.

Q When was the last time that you went to see a doctor for treatment?

A About a month ago.

Q Who was that?

A Dr. Pettey.

Q At that time did Dr. Pettey give you any instructions or prescriptions?

A No.

Q Did he do anything other than just examine you?

A No, not really. Just told me to keep massaging it and exercising it.

Q Did he tell you to lose weight again?

A No.

MR. SHIELDS: I have no further questions.

CROSS EXAMINATION

BY MR. TESTA:

Q Mr. DeMauro, when you first went into the hold of this ship it was 8:10, is that right, on the morning that this accident happened?

A About that.

Q What time did the accident happen?

A Around nine o'clock.

Q So that you were in the hatch about 50 minutes altogether, is that right?

A Maybe not even that.

Q Who else was with you during that 50 minute interval?

A The rest of the men in the gang.

Q Who were they, do you know?

A Steve Goch, Steve Menosky and Joe Vosk. That's all the regular men. The rest of the men in the gang were fill-ins that day.

Q Do you know how close these men were to you at the time the accident happened?

A No.

Q Did any of these men help you after the accident, as far as you know?

A Oh, yes.

Q Which ones?

A The three of them.

Q The same three you mentioned?

A Yes. And Hugh Pratt, Solney Bellos. They are from another gang, but they were there and they helped get the cargo off.

Q When you started working at 8:10 A.M., you were removing palletized cargo?

A Right.

Q Not you, yourself, but whoever was operating the hilo was removing palletized cargo, is that right?

A Yes.

Q Where was that palletized cargo located?

A Across the ship, midships all the way across against the temporary bulkhead.

MR. LASOFF: Your Honor, for the record, may I correct something? He said he arrived at the ship at 8:10, but they had to then cover the main deck, which took sometime. They arrived by bus at 8:10.

Q Do you know what time you actually get down into the hold to do this work that you were doing on the day of your accident?

A About 20 after, it took about ten minutes to take the covers, the pontoons off.

Q This palletized cargo was near the fence that separated number four from the number five hatch, is that right?

A It was against the fence.

Q You spoke about a fence separating the number four from the number five hatches. Was there any other fence in that

area?

A No.

Q Which side of the ship were these cases stowed on? The inshore or offshore?

A Inshore side.

Q Do you know who it was that yelled that this accident happened?

A No. A couple of fellows.

Q At any time during the 20 minutes or so that you were down in that hold was anybody else down there other than yourself and these men that you mentioned?

A No.

Q Had all these palletized cargo been removed before your accident happened or was some of it still there?

A We were working on it when it happened.

Q Do you know how much of it was still there?

A A couple of tiers. That is two tiers across the ship.

Q Those tiers ran from one side to the other?

A Right.

Q From the inshore --

A Onshore to offshore, offshore to inshore, however you want to do it.

Q Was any of that palletized cargo up against that

fence?

A It was all up against it -- well, the closest tier to the fence was up against the fence.

Q Were there other tiers then away from the fence?

A There was another tier.

Q How many tiers were there altogether?

A Two, maybe three tiers.

Q Did they extend all the way from one side to the other or did they stop somewhere?

A On the inshore side they went all the way across, on the offshore side they stopped where the pipe was.

Q You said that pipe came out about four feet?

A Right.

Q From the skin of the ship, is that right?

A True.

Q And that is where the palletized cargo ended, is that it?

A Yes.

Q Was there anything between that palletized cargo and the pipe or those cases that eventually fell on you?

A I didn't hear you.

MR. TESTA: Would the reporter read that question please?

(Question read)

A No.

Q Do you remember how you got to the Bayonne hospital?

A By ambulance.

Q After you were discharged from the Bayonne hospital did you leave under your own power?

A No, I went in a wheelchair to a car and I was driven home.

Q For some period of time you used crutches, is that right?

A Right.

Q That was about two months?

A Two or three months.

Q And then you used a cane?

A Yes.

Q Dr. LaPeluso treated you, I believe you said, up until sometime in 1972?

A Right.

Q Do you remember the last time you saw him for treatment?

A I think it was in April of '72, after he had removed the pin.

Q Did you ever see him after April of 1972?

A No.

Q Did he ever say he wanted to see you after April

of 1972?

A No.

Q Did he discharge you in April of 1972?

A Yes.

Q At that time did he say you were able to go back to work?

A Yes. He told me I was able to go back to work a year before that, too, while I still had the pin in my leg.

Q He told you you could go back a year before April of '72?

A Yes.

Q Which would have been April of '71?

A Well, no, I'm sorry. I got that mixed. I still had the pin in my leg, he told me I could go back to work. It was maybe six or eight months before they took the pin out.

Q Do you recall what month that was and what year?

A It was in January of '72.

Q Was that the first time he told you you could go back to work?

A Yes.

Q Did you try to go back to work at that time?

A No.

Q Did you make any effort at all?

A No, sir.

Q Did he continue to treat you after January of '72?

A Yes. In February he removed the pin.

Q And then he treated you up to April of '72?

A Yes. To the best of my knowledge it was April.

Q In April of '72 did he say you could go back to work at that time?

A Yes.

Q Did you try to go back to work at that time?

A No, sir.

Q When did you see Dr. Pettey for the first time?

A I don't recall.

Q How soon after you saw Dr. La Peluso for the last time did you see Dr. Pettey?

A A couple of months. B t I had seen Dr. Pettey before that, too, while I was going to Dr. La Peluso.

Q What was the occasion for your seeing Dr. Pettey while you were being treated by Dr. La Peluso?

A I wanted an opinion on what he thought of the leg and he said he thought at the time that I should wait for eighteen months before removing the pin.

Q Was this before or after removing the pin?

A Before it was removed.

Q How did you happen to go to Dr. Pettey?

A A friend of mine told me about him.

Q Did Dr. Pettey give you any treatment of any kind?

A No. Just told me to massage it, exercise.

Q How often did you see Dr. Pettey?

A Every couple of months. Once every couple of months.

Q How many times would you say that you have seen Dr. Pettey in 1972, for example?

A About four or five times.

Q Did he give you any treatment on those four or five occasions?

A No.

Q How many times would you say you saw Dr. Pettey in 1973?

A About six times.

Q Did Dr. Pettey give you any treatment on those six occasions?

A No, sir.

Q Have you seen Dr. Pettey this year, 1974?

A Yes.

Q How many times?

A Once.

Q When was that?

A I don't recall the date.

Q Did he give you any treatment on that one occasion?

A No.

Q I believe you said you were examined by a Dr. George Seaman in November of 1973.

A Right.

Q Did Dr. Seaman give you any treatment?

A No, sir.

Q Did you see Dr. Seaman once or more than once?

A Once.

Q That was the one and only time?

A Yes.

Q You were also examined by a Dr. Murray Burton in November of '73, right?

A Right.

Q Did he give you any treatment?

A No.

Q Then I believe you said you were examined by a Dr. Graubard last week, is that right?

A Yes.

Q That would have been in February of 1974?

A Right.

Q Did he give you any treatment?

A No.

Q How long did that examination last?

A How long did it last?

Q Yes.

A About a half hour.

Q Did you see any other doctors besides these doctors we have spoken about?

A Your people sent me to --

Q I beg your pardon?

A I.T.O. sent me to three or four doctors for examination.

Q Do you know their names?

A Not offhand. I only went to them once for examination.

Q Did you see a Dr. Mario Tagliagambe?

A Yes.

Q When did you see him?

A November 20th.

Q Of what year?

A 1973.

Q Did you see him once or more than once?

A Once.

Q Did you see a Dr. Andriola?

A Do you know his address? I could tell you better by that.

Q On East 19th Street in Manhattan.

A Yes. Across from Columbus Hospital.

Q Yes. When did you see him?

A I don't remember.

Q What year?

A That was quite awhile ago. That was in 1972, I'd say.

And you also mentioned a Dr. Goldberg.

A Yes.

Q Does that take care of all the doctors you have seen or have examined you in connection with this accident?

A Yes, sir.

Q Did any of these doctors tell you that you could not go to work?

A No. They said I could do light duty.

Q Which one said you could go to work, besides Dr. La Peluso?

A He is the only one that told me that.

Q Which doctor said you could do light duty, as you say?

A Doctor -- that is what La Peluso said, do light duty, but there is no job with light duty in the hold.

Q How about these other doctors? Did any of the other doctors that I have named now besides Dr. La Peluso tell

you could go back to work in any manner, shape or form?

A No, they never told me that.

Q Do you have any trouble walking today?

A Yes.

Q Are you walking with a cane?

A No.

Q You are not using a crutch either, are you?

A No.

Q At any time since March 31, 1971, which was the date of this accident up to the present date have you tried to go back to work?

A No, sir.

Q Have you gone down to the union hall and badged in?

A No. Because you are supposed to be able to go to work if you do that.

Q If you go down to the union hall and you put in your card or ticket you are supposed to go to work, is that right?

A The Waterfront Commission, you are supposed to go to work.

Q You haven't done that?

A No.

Q Have you collected the guaranteed annual wage?

MR. LASOFF: Objection, your Honor. Mr. Testa knows better than this.

THE COURT: Yes, that is immaterial.

MR. TESTA: If your Honor please --

MR. LASOFF: Not in front of the jury.

THE COURT: No argument about it. But if you want to argue the law of it we will take it on the side. It is a collateral matter and not allowed.

MR. TESTA: May we be heard at the side bar, your Honor?

(At the side bar)

MR. TESTA: If your Honor please, in order to collect the guaranteed annual income you have to badge in and indicate that you are ready to work.

THE COURT: You haven't laid a foundation for it, sustained.

MR. TESTA: I am merely asking him whether he has done it.

THE COURT: Never mind. I'm sustaining it.

(In Open Court)

Q Do you know of your own knowledge whether this man Patty Mazzicola was in the hatch at any time?

A I believe he was, but I couldn't swear to it.

Q You don't know that of your own knowledge then, do you?

A No.

Q Do you know Patty Mazzicola personally?

A Yes.

Q Did you see him in that hatch at any time before your accident happened?

A I don't think that day, no.

Q You didn't work in that 'tween deck yourself, did you, the day before the accident happened?

A I said what I remember, we opened the hatch, took off the hatch coverings and put a hilo down. Then it was time to knock off. I don't recall working in the hatch.

Q That was the day before?

A Yes.

Q So the first time you worked in this hatch then was the day of the accident?

A Yes, except to take the covers off and to put the machine down.

Q Yes, but did you, yourself, have anything to do with putting the hilo in the hatch?

A Yes, sure. They brought it in on the winch and you have to unhook it.

Q Who did the unhooking?

A Myself and the rest of the fellows in the gang.

Q How long did that take?

A Not too long. A few minutes. Then we put the machine, chocked it up.

Q Does that represent the number total of the time that you were in this lower 'tween deck area the day before the accident happened?

A Yes.

Q You didn't go around inspecting the cargo in that hatch the day you put the hilo in, did you?

A No, that is not my job to do.

Q That is not your job, right. On the day that the accident happened, that wasn't your job either, was it?

A Of course not.

Q You say this pipe was pyramided about three or four feet high?

A Yes.

Q And about four feet out from the side of the ship?

A Yes.

Q Was there anything between the pipe and the deck?

A I couldn't say. I couldn't say that. I don't know if there was anything.

Q Why couldn't you see it?

A I couldn't see if there was anything underneath the pipe because it was like it was touching the deck to me.

Q Is there anything there that would have blocked your

view of that pipe?

A No.

Q Wasn't there a fence there that would have blocked your view of the pipe?

A No, the fence was running across the ship.

Q Was there anything between the pipe and the cases?

A No.

Q Were the cases sitting right on top of the pipe?

A Yes.

Q No dunnage between them, the cases and the pipe itself, was there?

A No.

Q Were those pipes secured in any way?

A I don't think so.

Q Were they lashed to anything?

A No, they weren't lashed in our part of the hatch, I know that.

Q Were they attached to anything?

A No. To each other. They were in bundles.

Q I am talking now about the cases that were on top of the pipes, were they secured to anything?

MR. LASOFF: I'd like the record to note that there is no way that Mr. DeMauro could have known about cases, since cases were just mentioned now.

THE COURT: If that is an objection, I overrule it.

Q Were they leaning against the side of the ship, is that what you were going to say?

A Yes.

Q They were not leaning against this palletized cargo that you were moving, were they?

A No.

MR. TESTA: No further questions.

REDIRECT EXAMINATION

BY MR. LASOFF:

Q Mr. DeMauro, Dr. La Peluso, was he your own doctor?

A No.

Q Who sent you to Dr. La Peluso?

A I.T.O.

Q Did you have anything to do with selecting Dr. La Peluso?

A No.

Q Aside from Dr. La Peluso, did any other doctor tell you you were able to work at all?

A No.

Q You said that I.T.O. sent you to Dr. Goldberg, who wanted you to take physiotherapy treatment in Brooklyn.

A Yes.

Q And you asked to get a physiotherapist in Staten Island?

A Yes.

Q Were you ever given that physiotherapist in Staten Island?

A No.

Q You were asked about badging in. When you badge in to a union hiring hall or at your pier, does that indicate that you are ready, willing and able to work?

A Positively.

Q Can you badge in if you are not able to work?

A No.

Q You said that you never tried to do this work as a holdman. Can you tell us why?

A I couldn't go up and down a ladder, to begin with.

Q Can you lift cargo?

A No, sir.

Q Can you walk for more than a few blocks?

A No.

Q If you are able to work, in the Port of New York in 1971 and now, is there such a thing as a guaranteed annual wage?

A Yes.

Q If you badge in to work everyday during the year or everyday that you are required to badge in, which I believe is five days a week, are you guaranteed 40 hours of work a week for 52 weeks of the year?

A Yes.

Q Is that guarantee at the hourly rate of pay then in force for longshoremen?

A Yes.

Q And that is now $5.95 an hour?

A That's right.

Q That would be mathematically --

THE COURT: You are going over the ground you have already gone over.

MR. LASOFF: All right.

Q You have not badged in?

A No, sir.

Q And you are not collecting the guarantee?

A No.

MR. LASOFF: No further questions.

RECROSS EXAMINATION

BY MR. SHIELDS:

Q Mr. DeMauro, your gang was working on palletized cargo?

A Yes, sir.

Q Which was stored in athwartship or cross ship situation?

A Yes.

Q Do I understand you to say that you removed one or two tiers all the way across the vessel?

A No, I didn't say we removed one or two tiers. We were working on it. There was two or three tiers there. We were working on it. At the time of the accident we only worked about 20 minutes or so, so we couldn't have removed one or two tiers.

Q How much cargo had you removed from that section?

A I'd say about ten drafts.

Q How many palletized units make up a draft?

A That is a draft, a palletized unit.

Q One single --

A If they are light you take two at a time, the machine will take two at a time.

Q Were these palletized units light?

A Some were cartons, some were cases. The ones that were tiered two together that you could take, we took the two.

Q Had you started removing those palletized pieces from the offshore or the inshore side?

A The offshore side.

Q Over where the cases and the pipe were stowed?

A Yes.

Q How much had you removed from that section?

A Ten or so drafts.

Q Had you worked those right down to the deck on the offshore side?

A Yes, sir.

Q At the time of the accident were you carrying a piece of four by four?

A Yes.

Q How long was that four by four?

A About ten feet.

MR. SHIELDS: Thank you.

THE COURT: You may step down.

(Witness Excused)

MR. LASOFF: Does your Honor want to start with a new witness now or break for lunch?

THE COURT: No, we can start with the next witness.

J O S E P H V O S K, called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LASOFF:

Q Mr. Vosk, were you a witness to the accident that

happened to Pasquale DeMauro on March 31, 1971?

A Yes, I was.

Q Where did that accident happen?

A Happened on the ship down at the Military Ocean Terminal.

Q In Bayonne?

A Bayonne.

Q Do you remember the hatch it happened in?

A Either four or five. I couldn't be sure on that.

Q Was that a double hatch, so you couldn't tell which was four or five?

A Yes. You could go right through to either one.

Q You didn't have to go up on the main deck to get from one to the other?

A No.

Q There was no permanent bulkhead between the two, is that correct?

A That's correct.

Q Did this happen on a ship called the Green Port?

A It was the Green something. I couldn't be sure what the last name was.

Q You have various ships of this line come into Bayonne, is that correct?

A Yes.

Q What hatch level did it occur in?

A The lower 'tween decks.

Q Had you worked on that ship the day before?

A I hadn't worked on the ship the day before, but the gang had.

Q You hadn't worked the day before?

A No, I hadn't worked the day before.

Q What was your job on this gang the day before?

A I was the machine operator, the hilo driver.

Q Can you tell us approximately what time you commenced work in the lower 'tween deck?

A About twenty after eight.

Q Were you going to load or discharge this particular hatch?

A Discharge.

Q Was this whole ship being discharged?

A Yes.

Q There was no loading work going on board that ship at all, is that correct?

A No, not to my knowledge.

Q You say that you were the machine driver. Is that a fork lift or hilo machine?

A Yes.

Q And the cargo that you were going to discharge,

what kind of cargo was that?

A It was palletized cargo. It was either canned goods, you know, a certain amount of packages on one pallet that already came on a pallet, didn't have to be hand stowed.

Q Can you tell the jury what a pallet is?

A A pallet is a skid made of wood, four by four, four by six, or they come larger, six by eight. What they call palletized cargo is where the cargo is piled on this thing evenly and it is strapped together, so when you lift the one unit, you are taking off, could be 40, 50, 60 cases in one draft.

Q A pallet is approximately four feet wide by six feet long?

A Approximately.

Q Is there a space on this pallet where the blade of a hilo goes in so that the blades can pick up a pallet?

A Yes.

Q When you say "palletized," that means that the cargo comes in tied down to the pallet itself?

A Yes.

Q And you remove the pallet and the cargo?

A Yes.

Q What time did this accident to Pat DeMauro take place?

A I would say approximately about twenty to nine, a quarter to nine. I couldn't be too sure on that. I know we were working about fifteen minutes when the accident happened, fifteen, twenty minutes.

Q Where were you when the accident took place?

A I was going in to pick up a pallet.

Q This cargo was where?

A This cargo was to the rear of me.

Q It was to the rear of you and it was stored --

A Excuse me, the cargo that I am picking up?

Q Yes.

A It was like going across from port to starboard.

Q So the cargo was stowed athwartship?

A Cross the ship, yes.

Q And you and your machine were facing towards that cargo, is that correct?

A Yes.

Q The cargo that fell, where was that?

A That was to my back.

Q What cargo was there to your back?

A There was pipe lying on the deck and there was four, five cases piled up on top of this pipe.

Q Was there anything in front of that pipe or the cases?

A No.

Q What happened?

A Well, when I was picking up my cargo, going in to get my cargo, I heard somebody yell and somebody says to me, "Get your machine off here in a hurry." As soon as I turned around I seen Mr. DeMauro laying on the deck with three cases laying on top of him.

Q Was this machine anywhere in the vicinity of Mr. DeMauro at the time the accident happened?

A About fifteen, twenty feet away.

Q Had your machine come anywhere near this cargo that fell?

A No, sir.

Q Had you seen, yourself or any other longshoreman down in the hatch that day, touch or move this cargo that fell, in any way?

A No, sir.

Q I show you these photographs, Mr. Vosk --

THE COURT: Mark them first.

(Plaintiff's Exhibits 4, 5, 6 and 7 marked for identification.)

Q I show you these four photographs and ask if you recollect when they were taken.

A Yes, I do.

Q Were they taken sometime after this accident occurred?

A Yes, after the accident.

Q Were they taken by the United States Army?

A I don't know who took them.

Q Do those photographs fairly and accurately show the cargo that fell and the pipe as they existed or almost as they existed at the time they covered Mr. DeMauro?

A Yes.

MR. LASOFF: I offer these in evidence, your Honor.

MR. SHIELDS: May I see them?

MR. LASOFF: Sure.

MR. SHIELDS: I have never seen these before.

(Pause)

MR. SHIELDS: No objection.

MR. LASOFF: I offer them in evidence.

(Plaintiff's Exhibits 4 through 7 were received in evidence.)

xxx

MR. LASOFF: For the record, your Honor, may I read from the back of the photographs which says, "Publication of this photograph is not authorized unless approved for release by a Public Information Office at any Army activity or installation and so noted herein. Its use in commercial advertisment may be approved by the Public Information Department

"of the Army, the Pentagon in Washington 25, D. C. If published please credit U. S. Army photograph."

May I show these to the jury, your Honor.

THE COURT: Give two to the jurors in the front and two to the jurors in the back.

(Pause)

THE COURT: We will suspend at this time until 2:15. Please don't discuss the case in the meantime. Keep your minds open. In view of the snow which you can see is falling quite heavily, we will not be here later than four o'clock this afternoon, so you can plan whatever you have to plan. We will suspend if not before, certainly by four o'clock.

(Luncheon Recess)

AFTERNOON SESSION

2:15 P.M.

(In Open Court - Jury Present)

J O S E P H V O S K, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. LASOFF:

Q Mr. Vosk, those pictures were taken substantially after this accident, is that so?

A Yes, I would say quite awhile after the accident.

Q If you look at the pictures, can you see that all the other cargo has been discharged except this?

A Yes, it looks like that. Even the jeep that was behind the fence over there on this one particular picture is gone.

Q In other words, there was a jeep behind that fence and it is gone now?

A Yes.

Q The fence that fell?

A Yes.

Q Did you at any time on the 31st day of March, 1971, while you were down in that hatch see the hatch boss down in the hatch?

A On that particular day, no.

Q Did you see any ship foreman down the hatch on that

particular day?

A After the accident.

Q Was the hatch boss down in the hatch after the accident, too?

A I don't remember. I couldn't be sure.

Q When this cargo fell who was the nearest person to the cargo?

A Patty would have to be the nearest one to it. He is the one that got hit with it.

Q Nobody else was closer to the cargo than he was?

A When the accident happened, when the cargo fell, I wasn't directly looking at him. I was facing in a different direction.

Q When you turned and saw him, was there anybody closer to the cargo than he was?

A When somebody yelled and I turned around I saw there was four or five guys there already.

Q Were you one of the men who helped to get him out from under this cargo?

A I knew Huey Pratt was, and Sonny Bello. He had a big four by four trying to pick up one of the cases.

Q Were you one of the men as well as Huey Pratt and Sonny Bello?

A A bunch of men were there.

Q What did they have to do to get him out?

A They had a four by four, it is a big piece of wood. They had to lift these cases. It was too big to do them. I seen Huey go underneath one of these cases to try to unwrap his leg, so they could get him out.

MR. LASOFF: No further questions.

CROSS EXAMINATION

BY MR. SHIELDS:

Q The ship foreman that you referred to, he is an employee of I.T.O, is he not?

A Yes.

Q And the hatch boss is an employee of I.T.O.?

A Yes.

Q They have nothing to do with the ship itself?

A No, sir.

Q Immediately before you heard someone holler, "Watch out," or whatever you heard, was there any movement of the ship?

A None that I could feel.

Q There was a temporary cargo fence between hatch number four and hatch number five, is that correct?

A Yes.

Q You were driving your hilo facing the cargo fence, is that correct?

A At the time of the accident, no. I was facing across the ship.

Q Where were you, offshore or inshore?

A I was offshore facing towards the inshore side going in to get the cargo.

Q Was that cargo fence to your left or to your right?

A To my left.

Q To your left as you were facing inshore?

A Yes.

Q Patty, or Mr. DeMauro was to your rear?

A That's right.

Q And if you facing the inshore side looked over your right shoulder, would you see a steel bulkhead separating one hatch from another?

A Yes. It wasn't really a bulkhead, it was big round things like an archway.

Q Separating one hatch from another?

A Yes. That would be like where the square would be.

Q To your left on the other side of that temporary cargo fence there was another hatch, is that right?

A That's right.

Q Do you know whether the vessel was docked port side to the dock or starboard side to the dock?

A I couldn't tell you that. I'm not sure about that.

If I was sure about that, I'd know just which way -- where five was. I'd know just what part of hatch four or five it was.

Q If you assume that the vessel was docked port side to so that you would be facing the port side of the ship, which would be the inshore side, would it not be a fact that you wouldn't be working in hatch number four?

A In other words, the bow would be to my right.

Q Yes.

A Yes, then I'd probably be in four.

MR. SHIELDS: Thank you, Mr. Vosk. That is all.

CROSS EXAMINATION

BY MR. TESTA:

Q Mr. Vosk, you have some photographs before you that have been marked in evidence. I show you Plaintiff's Exhibit 6 in evidence and ask you if you can tell me what these boards are that are underneath those cases.

A These big boards here I would say that is the part of the so-called temporary fence that they had up there. And the other stuff laying down on here, that would be just plain dunnage, chocks and all.

Q I show you Plaintiff's Exhibit 7 and ask you what those boards are that are underneath the cases.

A They look like part of the fence that was up there.

Q And Plaintiff's Exhibit 4, what are those boards that are under those cases?

A Part of the fence and some dunnage.

Q When you say part of the fence, what fence are you referring to?

A I am referring to the fence that separated hatch four from five.

Q So that when these cases fell, they fell right on top of that fence, is that right?

MR. SHIELDS: Objection, your Honor.

THE COURT: I think it assumes something not in evidence at this point, s[illegible] would sustain it as to form.

Q When those cases fell, which direction were you facing?

A I was facing across the ship.

Q Were you facing towards the fence or away from the fence?

A I was facing away from the fence. The fence would be here, I was facing across the ship.

Q When you say the fence would be here, which side would the fence have been on, your right or your left?

A My left.

Q Could you see that fence out of the corner of your eye as you were looking straight ahead?

A No, I couldn't.

Q Did you see those cases fall?

A No, I didn't.

Q After you heard the crash, did you turn around?

A Yes, I turned around when I heard somebody yelling and the other hatch boss told me to get my machine over there in a hurry.

Q When you turned around is that what you saw as reflected in these various photographs that are in evidence? Is that the way it looked?

MR. LASOFF: If your Honor please, it has already been testified to by this witness that he was under the cases. These cases have been moved. He can't possibly have seen that.

THE COURT: I know that, but --

THE WITNESS: When I turned around I still seen the --

THE COURT: Wait a minute. It is a question that can be put to the witness. I will overrule the objection. But what he is talking about is, immediately after you turned around and saw him there and saw him under the cases, was the fence also knocked down the way it is in that picture there?

THE WITNESS: I couldn't say. I didn't take notice of something like that.

Q Did you notice the fence at all when you turned around?

A No, I didn't.

Q Did you notice whether it was standing or whether it was down underneath these cases?

A I couldn't say. I don't recall.

Q But in any event, you do say that the boards that are under the cases look like part of the fence, is that right?

A That's correct, sir.

Q Was that fence in front of the cases or behind the cases or alongside of the cases?

A When the fence was intact it was behind the cases.

Q When it was upright, yes.

A Yes.

Q In what direction was that fence running when it was upright?

A Across the ship.

Q Was there any other fence there other than that one, other than the one that you say ran across the ship?

A It is hard to say. I can't really say. There may have been, there may not have been. There was none in front of our cargo, that I know.

Q Was there any shoring in front of those cases?

A Well, there was dunnage laying down there.

Q No, was there any big boards -- what is shoring, Mr. Vosk?

A Shoring is lumber they use to hold cases in position, to check it up.

Q Right. Was there any shoring there holding those cases in position?

A No, sir.

Q When you first went down into that hold to operate your hilo was there any shoring there holding those cases up?

A No, sir.

Q So that all this lumber that is underneath these cases represents the fence and dunnage, is that right?

A That's right.

Q When you were operating that hilo you were discharging palletized cargo by use of that hilo, were you not?

A Yes, sir.

Q What was the distance between that palletized cargo and these cases?

A I'd say fifteen, twenty feet.

Q Fifteen to twenty feet between the nearest stack of palletized cargo and these cases?

A Yes.

Q Was there anything in that space?

A No, just dunnage that was laying on the floor that the guys were picking up to get out of the way so I could move in there with my machine.

Q Had you worked in that hatch the day before with your hilo?

A I wasn't in the day before. I don't believe they did.

Q So that the first day you were down there and operated the hilo was the day of the accident, is that it?

A That's right.

Q Do you recall what time you went into that hatch?

A As soon as it was open. It was about twenty after eight.

Q And at that time was this palletized cargo there?

A Yes, the palletized cargo was about fifteen, twenty feet away from it.

Q Away from what?

A Where them cases came down.

Q Was there one tier or more than one tier of palletized cargo?

A There was more than one tier.

Q How much did you remove before the accident happened?

A I'd say about ten drafts.

Q Where were they located, the ten drafts that you removed?

A They were located on the -- towards the square part, towards the center part of the ship, between four and five.

Q How close was that spot to where these cases were?

A Well, like I said, about fifteen, twenty feet.

Q So if I understand you correctly, all the palletized cargo that you removed prior to this accident was in the square of the hatch about ten or fifteen feet away from where these cases were, is that right?

MR. LASOFF: Objection, your Honor. He just said fifteen to twenty feet.

MR. TESTA: I beg your pardon.

Q Fifteen to twenty feet from where these cases were?

A Fifteen to twenty feet.

Q And you didn't remove any other palletized cargo, did you, before this accident happened?

A No, sir.

MR. TESTA: No further questions.

MR. LASOFF: No redirect, your Honor.

RECROSS EXAMINATION

BY MR. SHIELDS:

Q The cases that fell were in the same hold that you were working in, is that correct?

A That's correct.

Q So that you were facing the inshore side with your hilo, the cases were to your rear, is that correct?

A Yes. To the left of my rear.

Q And on your side of the cargo -- the temporary division between the two holds, and the cases fell away from the side of the fence, is that right?

A Yes. They fell like towards into our hatch. We worked where there was no shoring.

Q They didn't fall through the fence if there was a fence there?

A No, they fell forward.

MR. SHIELDS: Thank you.

THE COURT: You may step down.

(Witness Excused)

MR. LASOFF: Mr. Pratt.

H U G H P R A T T, called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LASOFF:

Q Mr. Pratt, are you in court today pursuant to a subpoena served on you by International Terminal Operating Company, Inc.?

A Yes, sir.

Q Did you ever see me before I walked into this courtroom this morning and you were sitting here?

A No, sir.

Q On March 31, 1971, were you working on board the Green Port?

A Yes, sir.

Q Incidentally, do you have that subpoena with you now?

A Yes.

(Handing)

MR. LASOFF: May I offer this in evidence, your Honor.

THE COURT: What relevance is it?

MR. LASOFF: That he has been subpoenaed by I.T.O.

THE COURT: He already said that. What do we have to do?

MR. LASOFF: All right.

Q Were you working in this double hatch on board the Green Port?

A Yes, sir.

Q Was that double hatch the four and five hatch?

A Yes, sir.

Q What deck level were you working in?

A I was working between decks on number five.

Q Were you in the same gang as Mr. DeMauro or in the other gang?

A No, I was in the heavy lift gang, Bello's gang.

Q That would be the gang that was working behind the separation fence?

A That's right.

Q Was your gang separated from Mr. DeMauro's gang by that fence?

A That fence and cargo.

Q What do you know about the accident that happened to Mr. DeMauro?

A I was discharging jeeps and I heard this crash, me and the hatch boss were close together, we just finished having a cup of coffee, and we turned around quick. We heard this guy scream.

Q You were in the number five hatch at this time?

A Right. It is a continued hatch.

Q But you were on the other side of the fence?

A That's right.

Q Had part of the fence come down as well as the cases?

A Well, they had a piece of separation there, some wood that was on the far side of the three or four cases that come down on Patty.

Q Were those cases nailed to this fence from your side of the hatch?

A Yes, they had a few nails in there to show the separation of cargo, one port from another. In other words, the part I had might have been put on in Oshkosh, and the other one in Japan, for all I know. But as the gang is set down to do its work, it only works for a certain point and doesn't do the other gang's work.

Q Nobody had removed these nails from these cases from this fence, is that correct?

A No, there was no need to.

Q I show you Plaintiff's Exhibit 7 and ask you if you can show me on that where the pipe we are talking about is.

A Right here. Here is your pipes (indicating).

Q Would you put a big P on there for pipe?

(Witness marks)

Q Does that picture show where the separation between four and five is?

A No, it doesn't.

Q Does the picture show the cases that fell?

A Yes, it does.

Q Would you mark C on each of the cases that fell?

(Witness marks)

A Looks like there was another smaller case here, the one that was on top of his head. That ain't here though.

Q You can't see that in that picture?

A No.

Q I show you Plaintiff's Exhibit 5 for identification and ask you, does that show the separation fence between hatch number four and five?

A Yes, that is the separation from his gang and my gang. They worked up to this point (indicating).

Q Would you draw an arrow and show where his gang would work and where your gang is. Draw the arrow by -- I guess we better call them by hatch boss names. Put an M for Mink's gang and a B for Bello's gang.

(Witness marks)

Q Was there any fence at all between the cases that fell and Mr. DeMauro's gang?

A Between --

Q The cases that fell and Mr.DeMauro's gang, in other words, on his side of the hatch?

A Was there any fence?

Q In front of the cases.

A In front of the cases, no. There was nothing there. They already had been eating into that cargo.

Q In back of the fence these cases were still attached by nails, you said, to that fence?

A Yes, they had a separation board. Two boards up with two or three nails in it that hook to the coamings, the back plates of the ship. There are wood beams that come up, they call them sweat boards, just for that purpose, of making fences.

Q Was anything else holding those cases in place except those two or three nails?

A Just them two boards to keep the cargo from falling on the jeeps.

Q I show you this photograph and ask you if you can show me where the cases fell, and where the fence was. And put a mark for cases and N for nails.

(Witness marks)

Q I show you Plaintiff's Exhibit 4 and ask you if that shows where the cases fell from.

A Yes, that is about right.

Q Does that picture also show where the fence and the cases fell?

A No, just shows you the cases, how they fell away.

Q So that we understand each ... there was a fence in back of these cases which formed th... ...khead of hatch number five?

A There was a case separating the two hatch -- there was a fence separating the two hatches. And then -- that is a fence. A fence is a separation of cargo. And then he had these boxes were on top of this pipe. And all they had was a piece of -- two pieces of wood to separate them from the jeeps. None of these pictures is the jeep. Right here was a jeep (indicating). After where these fell was a jeep.

Q Would you put the letters JEEP where the jeep was before they took it out?

THE COURT: What is the exhibit?

THE WITNESS: Six. Number 6 is on here, I guess.

Q Did you, yourself, see either the cases or the fence at all?

A I didn't see nothing. I heard them.

Q Did anybody on your side of the fence do anything with that fence before it fell?

A No. It wasn't our cargo. It was the other gang's so we had nothing to do with it.

Q So you would have nothing to do with that fence at all?

A Nothing whatsoever.

Q How long have you been a longshoreman, Mr. Pratt?

A Ten years.

Q Did you consider the way those cases were stowed on top of planks with a fence behind them a safe and proper way to stow those cases?

MR. SHIELDS: Objection, your Honor.

THE COURT: Sustained. That is what the jury is here for. Otherwise they could just as well have stayed home and listened to him.

MR. LASOFF: He is an expert longshoreman.

THE COURT: He is not an expert at this point by any means. I don't find him to be an expert. He goes aboard ships and works.

Q Was that the customary way that you found cargo braced or stowed in the Port of Bayonne from the time you started to work there until March 31, 1971?

MR. SHIELDS: Objection, your Honor. There is no testimony that he is that familiar with custom and practice and it is irrelevant.

THE COURT: Even if it does, custom and practice neither excuses nor provides the basis for significance. As I see it from Judge Learnedhand's decision, the jury is going to determine whether this was a reasonably safe place to work in.

MR. LASOFF: I have no further questions.

CROSS EXAMINATION

BY MR. SHIELDS:

Q Mr. Pratt, did I understand you to say that the couple of nails driven into those boards were only to separate the cargo?

A That's right.

Q They are not to secure the cargo, these two or three nails, are they?

A No.

Q You were in number five, is that correct?

A That's correct.

Q What cargo in number five was against that fence?

A It wasn't against it. It was about eighteen inches from it.

Q What was that?

A It was jeeps.

Q How many jeeps?

A Oh, I don't know, I guess there was about a couple of dozen in that hold.

Q Were they boxed or --

A No, wheeled in.

Q How many of those jeeps had been removed, if you know, before the accident to Mr. DeMauro?

A I guess about a half hour -- I guess about five

jeeps.

Q How many of those jeeps were removed from the offshore side?

A About three or four.

Q On Plaintiff's Exhibit 6 I see what appears to be a number of two by four boards, am I correct?

A Yes.

Q Is that what you identified as part of the fencing?

A No, I identified these up here, these six by twos, these two boards here, see the six by two?

Q There are two boards right here --

THE COURT: Turn it around so the jury can see it.

THE WITNESS: They are the same size as these sweat boards, so they had these boards nailed to these cases. There is another case missing. During the accident there was a jeep parked right here. Evidently they must have come in at lunch time when everybody was gone and took all these pictures.

Q Were you down in the hold when these pictures were taken?

A No, I was at lunch.

Q What time do you go to lunch?

A Twelve to one.

Q So these pictures were taken some three hours after the accident?

A I don't know that. I couldn't tell you that. They might have taken them at night.

Q But they weren't taken in the morning while you were down there?

A No.

Q I see a piece of four by four in Plaintiff's Exhibit 7. Would that be part of the fencing?

A I don't know. That could have been part of the four by four we used to lift the cases up. Yes, that is -- we ran and got these stronger timbers and put blocks on here so we could pry this off him. The first one, four or five guys got together and took it off his head.

Q You don't use four by fours for dunnage, do you?

A No, the carpenters, they use it for building fences.

Q They don't use four by fours for dunnage?

A No.

MR. SHIELDS: That's all.

CROSS EXAMINATION

BY MR. TESTA:

Q Mr. Pratt, in these photographs did you indicate where these two boards were that you say were nailed? Did they show in any of these photographs, the two that were nailed

to the cases?

THE COURT: Show it to the jury so they will know what you are talking about. Which exhibit is it?

THE WITNESS: He had it marked there before, N for nail.

THE COURT: What is the exhibit number?

MR. TESTA: There is Exhibit 6.

THE COURT: The N that is marked or there is where he says they were?

Q This is where they were, the N, is that right?

A Yes.

Q Would you put a mark at the actual board itself, the one in the picture, the one that was nailed to the case?

A You want me to pick it out?

Q Yes.

THE COURT: Put a big X on there.

(Witness marks)

Q You said there were two?

A Yes, well that X covers the two of them. It is right across the two of them. Is it big enough? These two by sixes, these sweat boards.

MR. TESTA: The witness has put an X covering both boards here, these two boards that run this way. The witness put an X there. Do you want me to pass these around, your Honor?

THE COURT: No, they will have a chance to look at them anyhow.

Q These two boards then were up against the skin of the ship back here where you have the N. that is the side of the ship?

A Yes.

Q They ran horizontally, is that right?

A They ran with the cargo. You see here, that is a post. They probably had them nailed to this post and the boxes here.

Q But the two boards that are here on the ground, were they up here horizontally?

A This is where the cases were. Here is the pipes here.

Q Did they run horizontally across the side of the ship?

A They were athwartships from port to starboard.

Q These cases were nailed to these boards, then, or vice versa?

A The boards were nailed to the cases.

Q And the boards in turn were up against the side of the ship then, weren't they?

A Athwartship is this way. The side of the ship runs from aft to forward.

Q What is this wall here?

A That is the side of the ship.

Q Isn't that where these boards were?

A They were running from here along the cargo.

Q Right.

A Yes.

Q Okay. The purpose I think you said was to separate that cargo, is that right?

A To keep any cargo from falling on the vehicles. When you ship cars or jeeps, in other words, when they come to discharge the cargo they don't want the cargo to be on top of the hood of some guy's car or in his windows. So they put this here so that wouldn't move onto it.

Q They put these boards to keep these cases from falling onto the jeeps, is that right?

A Yes, sir.

Q That's all they had there to hold those three 700-pound cases, is that right?

A That's all I seen.

Q During the time that you worked you were in the number five hatch now, right?

A Yes, sir.

Q That is on the other side of the fence separating four and five. Were you actually engaged in moving jeeps,

yourself?

A My whole gang was engaged in it.

Q Yes, but I mean you personally.

A Yes. We take the jeep, we push it to the center of the hatch, we hook up wires and they pull it out.

Q Before you did that you had to unchock the jeep or untie it in someway, didn't you?

A The jeep, yes. It is four by fours.

Q It was tied by four by fours on the deck?

A The carpenter's security.

Q Those four by fours are on the deck?

A That's right.

Q You remove those drafts and what did you do, push them into the center of the hatch?

A Yes, sir.

Q If I understood you correctly you said the nearest jeep to that fence was about eighteen inches away.

A About eighteen inches away.

Q Do you know how many jeeps you removed before this accident happened?

A I'd say it was a half-hour's work, we do about maybe ten an hour, so five jeeps.

Q Do you know where they were located, whether on the port or starboard side of the ship, the ones you removed?

A These were all the port side.

Q Was the port side the inshore or offshore?

A Offshore.

MR. TESTA: No other questions.

MR. LASOFF: No questions, your Honor.

MR. SHIELDS: No questions.

(Witness Excused)

MR. LASOFF: Mr. Goch.

S T E P H E N G O C H, called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LASOFF:

Q Mr. Goch, would you try to keep your voice up, I notice you have a rather low voice.

A Yes, sir.

Q Were you a member of the gang that was working with Patty DeMauro on that day, March 31, 1971?

A Yes, sir.

Q Were you a witnes to the accident that occurred to him on board the Green Port?

A Yes, sir.

Q Do you remember which hatch you were working in?

A It is questionable, four or five, because of the

double hatch.

Q In other words, you don't remember which side of the ship was next to the dock so you can't tell if it was four or five?

A I can't be sure.

Q But it would either be the forward end of five or the after end of four, is that correct?

A Correct.

Q Had you worked in this same hatch the day before?

A I'm not sure if I was in that day. But if I was in, that is where we worked. I might have taken the day off or not.

Q You don't remember whether you worked the 30th day of March. Were you working the 31st day of March?

A Yes, sir.

Q What time did you report to work that day?

A As usual, eight in the morning.

Q When you report to work at eight o'clock, are you then taken to the ship?

A Pardon me?

Q Are you then taken to the ship?

A Yes. We are taken by bus from the main gate down to the ship.

Q Is this an Army bus?

A No, at that time it was -- yes, I would say it was an Army bus.

Q When you got to the ship did you start to uncover either hatch number four or number five?

A Yes. We went up the gangway and started to open up.

Q When you uncovered hatch number four or five, was the upper 'tween deck level of that hatch already opened?

A Yes, it was opened the night before.

Q So that all you had to do once you uncovered that hatch was to go down to the lower 'tween deck to start discharging?

A Yes.

Q Was all the work to be done by I.T.O. and your gang on that ship, discharge?

A I can't answer that, but our hatch had to be discharged. I don't know about other hatches.

Q Were you a witness to the accident that occurred to Pat DeMauro?

A Yes.

Q Would you tell us what you saw?

A I was working after unloading a draft sent up to go back up on the dock, when I heard someone holler, "Look out." As I turned around I seen these three or four cases come

tumbling down and Pat tried to get away but he couldn't, and it pinned him underneath.

Q How many cases pinned him?

A I seem three were on top of him and one brushed by the side of his arm.

Q These cases that you saw pin DeMauro, before they fell were they standing on top of anything?

A Yes.

Q What were they stowed on top of?

A A draft of long pipe, about 20 feet long.

Q Was there anything bracing or checking these cases in front of the cases?

A None that I could see.

Q Were they up against a separation fence?

A They were supposed to be up against a separation fence, but that was behind the cases. As far as I could see they were supposed to be up against a fence.

Q The back side was up against a fence?

A That part I couldn't see.

Q Nothing was in front of them?

A Nothing.

Q Did you see any chocks bracing this cargo to the pipe or to the cases and the pipe?

A None whatsoever.

Q Did you see any fencing in front of those cases before they fell?

A Not in front.

Q When these cases fell how far was Pat DeMauro from the cases?

A I'd say about five feet, maybe. Maybe less.

Q Was there anyone closer to these cases than Pat DeMauro?

A No one.

Q At the time this accident occurred there was a hilo down in the hatch, was there not?

A Yes, sir.

Q How far was that hilo from these cases that fell, before the accident?

A He was toward the middle of the hatch after just delivering a draft that had to go up. I'd say about fifteen, sixteen feet.

Q Had anybody to your knowledge that you saw touched either those pipes or those cases or any cargo that was stowed on the offshore wing prior to this accident?

A Explain that question again?

Q Withdraw the question. Had any longshoreman in your gang prior to that accident touched the pipes or the cases or anything else on the offshore side?

A No, sir.

Q Do you know who yelled, "Look out"?

A Yes.

Q Who was that?

A A friend of mine, Steve Renowski. I recognized his voice.

Q What was Patsy DeMauro doing before this accident happened, or just before?

A Like we all were doing, he was in the process of picking up extra dunnage that was between the palletized, like four by fours and pieces of wood. He was bending over picking them up to make room so the hilo could come in and pick up the next draft. With the dunnage in the way the hilos couldn't come in. So he was bending over picking them up, and like I say someone hollered and he tried to get out of the way but couldn't make it.

Q Was your hatch boss in the hatch at any time that day?

A I didn't see him.

Q Did he come down after the accident?

A I can't be sure because I had to go up into the office to make a report with the I.T.O. safety man. So I was gone a considerable amount of time after the accident.

Q Were you called at the I.T.O. office to make a

report immediately after this accident?

A Yes.

Q And did you make such a report?

A Yes, I did.

MR. LASOFF: No further questions.

CROSS EXAMINATION

BY MR. SHIELDS:

Q Will you describe, please, the cargo that you were working on? How was it set in the hold of the ship?

A They were going tier for tier athwartwise of the ship.

Q Was this cargo by the way against that temporary fence that we have talked about?

A Yes. You had a couple of tiers, in fact. You had to work your way in towards the fence. You had to go tier for tier.

Q How far was this cargo from the inshore skin of the ship?

A I don't know nothing about the inshore because I was working on the offshore.

Q How long had you been working on the offshore cargo?

A We had just come down after we opened up and started in, maybe twenty after, twenty after, somewhere around that time.

Q You worked a half hour or so?

A Yes, roughly.

Q Do you agree with the other two witnesses whom you heard testify that about ten drafts were removed before the accident?

A I can't say ten exactly. Eight to ten, maybe.

Q Or twelve perhaps?

A Not twelve. We are not that fast at work to eliminate twelve in a half hour.

Q How far to the offshore side did this cargo extend?

A All the way to the offshore.

Q Right over to the place where these three or four cases were piled on top of the pipes?

A Yes, I would say so.

Q Was any of that cargo stowed against the three or four cases?

A Yes.

Q Would you describe that particular cargo?

A It was all palletized, four feet by four feet palletized, strapped with bands, containing cartons, maybe 50, 60 pounds apiece.

Q This ran all the way over --

A All the way over from the center of the ship up against the ones that were on the pipe.

Q And they were leaning against the ones --

A That is how we had to take them out one at a time.

Q You were doing at this time what they call breaking down cargo?

A Breaking in.

Q And breaking down, isn't that a term you use?

A Breaking in and bringing it to the center of the hatch and discharging onto the dock.

MR. SHIELDS: No further questions.

CROSS EXAMINATION

BY MR. TESTA:

Q Mr. Goch, were you in court a few minutes ago when Mr. Pratt testified?

A Yes, I was.

Q Did you hear him testify?

A Yes.

Q Did you hear him say that this palletized cargo, the nearest portion of this palletized cargo was fifteen feet away --

MR. SHIELDS: Your Honor, I object to this. This is not proper cross examination of this witness.

THE COURT: Sustained as to form.

MR. LASOFF: May I further object, it wasn't Mr. Pratt who said that, it was Mr. Vosk.

Q All right, did you hear Mr. Vosk say that?

A Yes, he might have been excited. There is no way he can leave a space of fifteen feet from one piece of cargo to another.

Q Were you working in that hatch all the time that they were there, Mr. Vosk and Mr. Pratt?

A Yes.

Q What were you doing?

A I was doing the same thing as Patty DeMauro was doing, I was picking up loose pieces of dunnage and throwing them on the side to make room for the machine to go through, and in the meantime hooking up the drafts that were to be taken out?

Q What drafts were you hooking up?

A The palletized. As soon as I hooked it up, my job is to go back and pick up the loose dunnage.

Q These are the same pallets that Mr. Vosk was picking up with the hilo, aren't they?

A That's right.

Q So he would take them with the hilo and bring them to the square of the hatch and you would hook them up, right?

A I'd hook them and go back and pick up the loose dunnage, because normally you put dunnage between each tier of cargo so as not to shift.

Q There were eight or ten that were removed, is that right?

A Yes. They were located in front of the ones that were laying on the pipe. They had to be taken out before you could get to those.

Q And he had removed eight or ten of these, right?

A Yes.

Q Did he remove a whole tier or just a top or what?

A He had to go tier for tier. I don't know how much was in the tier at that time.

Q How many tiers were there?

A Possibly two or three.

Q These two or three tiers, were they alongside of each other?

A They would have to be.

Q Where did the first one start?

A Closer towards the middle of the hatch. Then you would have to work your way closer to the fence.

Q The nearest one was towards the square of the hatch and the last one was near the fence, is that right?

A That's right.

Q Was he taking them from the end or the middle or where?

A He was going tier for tier. You start off one

way and you go one and one and one. You just don't jump from one corner to another.

Q He removed the first tier that ran from the side of the ship, is that right?

A That's right.

Q Ran from one side of the ship to the other?

A On the offshore side, yes.

Q How many pallets were in that one tier that ran from the offshore side to the inshore side?

A That is hard to say because there was nothing in the square, so it had to be just in the wing. I would say roughly maybe about six in a tier.

Q In any event these six or eight pallets that he removed were all in that front tier, is that right?

A Possibly, yes. The front tier before he can get back to the second tier.

Q Before you can get to the second tier and the tier nearest the fence you had to remove the ones in the front, is that right?

A That's right

Q So that the six or eight pallets that went up before this accident happened were all taken from that front tier, the first tier, is that right?

A That's right.

Q And the ones in the second tier and third tier hadn't been attached yet, is that right?

A Right.

MR. TESTA: Thank you.

MR. LASOFF: No questions, your Honor.

THE COURT: You may step down.

MR. LASOFF: Your Honor, if you forgive me, I didn't expect to go this fast. I have two doctors and another witness tomorrow morning. With four witnesses I have never seen it go this fast yet.

THE COURT: It is progressing very good. I compliment all the lawyers. I don't know how many cases you have heard, but these lawyers are proceeding with great speed. I don't think with any less efficiency, because I think the picture is very clear here. There is nothing confusing about what happened. The obligations that arise as a result thereof are different. But what has happened I think is pretty clear. Is there anything the defendants want to read, depositions or anything else, or do you have any depositions you want to read?

MR. LASOFF: I can put in some exhibits, your Honor.

THE COURT: Let's put in as much as we can. I told the jury they could go by four. It is only ten after

three. If we can do as much as we can. Actually the weather has moderated, I believe.

MR. LASOFF: I offer into evidence, your Honor, the ship's log for the 31st day of March, 1971.

MR. SHIELDS: I have no objection, your Honor. In fact at this time, your Honor, in order to save time I would like to join with plaintiff and mark the log of the vessel from Honolulu up through the day after the accident.

MR. LASOFF: No objection.

MR. SHIELDS: Then we can keep them all in consecutive order, perhaps mark it all as one exhibit.

THE COURT: Mark it as one exhibit but at this point it will be marked Plaintiff's Exhibit 8 and the Defendant's Exhibit A.

xxx (Plaintiff's Exhibit 8 received in evidence.)

xxx (Defendant's Exhibit A received in evidence.)

MR. TESTA: If your Honor please, I have never seen any of these things.

THE COURT: You will be able to look at them overnight. You will mark them and if you have any objection you can tell me tomorrow.

MR. TESTA: That's all right. It is going to take me a long time to read them.

THE COURT: They will give you whatever you need.

Besides, you can remain here after the jury leaves.

MR. LASOFF: Do you have a stowage plan or just an extract?

MR. SHIELDS: No, we don't have a stowage plan. The Army or I.T.O. may have it.

MR. TESTA: May I ask that they be marked for identification, your Honor?

THE COURT: No, I marked them in evidence as against them because they asked to have it in evidence. When the time comes for you, I will mark them for identification for you, if you want it. I am taking this as to case one, the two parties, and if you object to it later, I will rule on it then.

MR. LASOFF: Reading from Plaintiff's Exhibit 8, 0910, Pasquale DeMauro, waterfront number 21625, of 219 Nelson Avenue, Staten Island, suffered fracture of right thigh while discharging cargo number four lower 'tween deck. Pratt, longshoreman, 0920, which would be 9:20 A.M., injured party taken to Bayonne hospital in U. S. Army ambulance, looks like S.F. Gonzales, Chief Officer. I'd like to read from the deposition of the chief officer, your Honor.

THE COURT: Let me explain to you what happens here. Evidence in the case usually comprises a number of things. The testimony of witnesses, such as you have seen

here today, who come, take an oath and then testify as to what they know about the case as a result of their own personal observation, including any natural inferences that flow from that as well as anything that is brought out on cross examination. Exhibits in the case are also evidence. Sometimes depositions are taken. Under the federal practice each side has a right to examine anyone who knows anything about the case before the case comes up. They are sworn in just the same as they are sworn in in the courtroom here and they took an oath to tell the truth. They are then examined by both sides. Sometimes in a case like this, for example, Mr. Testa wasn't even there.

MR. TESTA: That's right, your Honor.

MR. SHIELDS: He was given notice, your Honor.

THE COURT: Sometimes they give notice, sometimes he comes also. What the lawyer is reading now is evidence in this case just as if the person had taken an oath before you.

MR. LASOFF: That is the deposition of Santiago Gonzalez, who was chief officer of the Green Port. This was taken by plaintiff pursuant to notice at the offices of Zimmerman & Zimmerman. Should have been my office, actually, but it is listed as Zimmerman & Zimmerman, your Honor. Actually it was pursuant to notice by the third party defendant, I.T.O. This is direct examination by Mr. Lasoff.

"Q For the record, sir, what is your name?

"A Santiago Gonzalez.

"Q What is your present home address?

"A 67-12 Phillip Street, Metairie, Louisiana 70003.

"Q Mr. Gonzalez, on March 31, 1971, were you employed on board a ship known as the Green Port?

"A Yes, sir.

"Q Who did you work for on that day?

"A The Central Gulf.

"Q In what capacity were you employed on the Green Port on March 31, 1971?

"A As chief mate.

"Q How long prior to March 31, 1971, had you been employed on board the Green Port as chief mate?

"A Approximately five years, four or five years.

"Q When did you first commence to work in any capacity on the Green Port?

"A About four or five years previously to then.

"Q So all in all you started working on the Green Port either in 1961 or '62?"

Then there is some colloquy of counsel, and the answer is:

"A But around 1967, I believe, something like that,

"but I don't remember the exact date.

"Q Are you still working on board the Green Port?

"A Yes, sir.

"Q In what capacity are you working on that vessel now?

"A As relieving the master.

"Q When the master comes back will you be chief mate again?

"A Yes. It is up to the company what they want to do.

"Q But your regular classification with the company is that of chief mate?

"A Correct.

"Q Where was the Green Port docked on March 31, 1971?

"A In Bayonne Navy Yard.

"Q At Bayonne Ocean Terminal?

"A Yes. That, I believe, is the official name for it.

"Q Is that an installation of the United States Government?

"A Yes, sir.

"Q When did the Green Port arrive at the Bayonne Ocean Terminal?

"A I would have to refer to the log to answer that.

"Q Would you tell us when it arrived and at what time?

"A March 29th at 1530. That is as best as I can make out by the log book.

"Q What would 1530 hours be land time?

"A That would be 3:30 P.M.

"Q Was any longshoring work, stevedoring work done on that ship on the 29th?

"A No, sir. Not according to the log book.

"Q What day of the week was March 29, 1971?

"A It was a Monday.

"Q Was there longshoring work conducted on board the Green Port on March 30, 1971?

"A Yes, yes, sir.

"Q Can you tell me what hatches were worked on March 30, 1971, by longshoremen?

"A They started with the morning, number one, number two and number five.

"Q Was this ship being loaded or discharged at Bayonne?

"A The ship was being discharged.

"Q How many gangs worked on hatch number five on

"the morning of March 30, 1971?

"A One gang worked number five.

"Q Which part of number five was being discharged on the morning of March 30, 1971?

"A The log book does not state which part it was.

"Q Can you tell us how long the discharge operations continued in hatch number five that day, that is March 31, 1971?

"A They started at 11:10 in the morning. They knocked off for lunch. From 1142 they knocked off for lunch until 1300. They started at 1315, which would be 1:15 P.M. land time.

"Q When did they stop that day?

"A At 1630, which would be 4:30 P.M.

"Q Were discharge operations continued on March 31, 1971?

"A At hatch number five?

"Q Yes, sir.

"A They were continued at 0800, which would be 8:00 A.M.

"Q Does the log say where at hatch number five the longshoremen went to work at 8:00 A.M. on March 31, 1971?

"A At 8:30 at the discharging number five lower

"'tween deck.

"Q How many gangs?

"A That morning we had four gangs.

"Q How many gangs at number five?

"A One gang at number five.

"Q Is there a record in the ship's log on an accident that occurred to Patrick DeMauro on March 31, 1971?

"A Yes, sir.

"Q Could you tell us what the ship's log contains with regard to that accident?"

I have read that in the record already, your Honor, so I won't bother reading it again.

"A The entry made by me reads 0810, Pasquale DeMauro, Waterfront No. 21625, Longshoreman, 329 Nelson Avenue, Staten Island, suffered fracture of right thigh while discharging cargo, number four lower 'tween deck. Witness: H. Pratt, longshoreman 0920. Injured party taken to Bayonne hospital 0930, the U. S. Army ambulance. Signed: J. Gonzalez, Chief Mate.

"Q On the Green Port, was hatch number five and number four one hatch with a common entryway?

"A It was one hatch, continuous hatch with two openings.

"Q Was there another gang working at number four

"or was it the same gang working at number five and number four?

"A No, there was one gang at number four and one at number five.

"Q This accident happened at number four?

"A Yes, sir, according to the log book.

"Q What time, according to the log book, did this accident happen?

"A 0910. 10:00 A.M. in the morning.

"Q You said 0910. Wouldn't that be nine o'clock in the morning, not ten o'clock?

"A That would be ten minutes after nine o'clock. After nine.

"Q Where were you at the time this accident occurred, if you remember?

"A I don't remember, but I was on board the ship. I don't know which particular place.

"Q Were you a witness to the accident?

"A No, sir.

"Q How did you first learn about the accident?

"A From the mate on watch.

"Q Who was the mate on watch?

"A A fellow by the name of Harrison.

"Q What mate was he?

"A He was the third mate.

"Q What were his duties on March 31, 1971, on board the Green Port?

"A He was in charge of the deck.

"Q He had the deck end?

"A Yes, sir.

"Q And was there more than one mate on duty at that time?

"A The third mate and myself, supervising the third mate and cargo operations.

"Q Did the third mate see the accident, if you know?

"A I don't think so.

"Q Do you know when he was notified that this accident had occurred?

"A No, sir.

"Q Did he make any entry in the log?

"A I do not see any entered in the log by him.

"Q Is this the rough or the smooth log that you are looking at?

"A This is a copy of the rough log.

"Q Where is the smooth log kept?

"A Aboard the ship.

"Q Am I correct, the original entries are made

"in the rough log and then they are transferred to the smooth log?

"A No, sir. You are correct or you were correct some years ago but not at the present time.

"Q At the time of this accident, what was the custom and practice?

"A You have the original and two carbon copies.

"Q That is a carbon copy?

"A Yes, sir.

"Q So there is no rough log any more, that is a carbon copy of the smooth log?

"A Right.

"Q Does the log reveal how the accident happened?

"A No, sir.

"Q Did you, yourself, give any statement as to how this accident happened at any time to anyone?

"A No, sir.

"Q Do you know if Mr. Harrison did?

"A I don't know.

"Q Was there any seaman on duty at hatch number five at the time this accident occurred?

"A No, sir.

"Q To your knowledge did any member of the ship's

crew witness this accident?

"A No, sir.

"Q Did you or the third party investigate this accident to determine what happened?

"A After it was reported to me I tried to find out what actually did happen. My main concern was to get the man off the ship to the hospital. Afterward I talked to somebody, to some other longshoremen and to the hatch foreman and I obtained the information from him, most of the information that I have in the log book.

"Q What information did you obtain as to the happening of the accident?

"A He more or less pinpointed the name of the injured party and the time and his number, Waterfront Number, and what he was doing at the time.

"Q Did any of these men tell you that cargo had collapsed and struck the man?

"A I don't recall.

"Q Would I be correct in stating that what you have testified to now is your entire recollection of the accident, what you did and what you recorded and whom you spoke to?

"A More or less, that would be it.

"Q Did you go down and look at the place of the

"accident, where the accident occurred?

"A Afterward, yes, sir.

"Q What did you see?

"A As far as I remember, they had some cargo there, some general cargo and some pipes. I talked to some of the men around, I asked them what happened, the longshoremen, I mean, are not very helpful when an accident happens. They are not very talkative when an accident happens. So I put in the log what I could gather talking to different longshoremen.

"Q You went down in the ship and you said there was general cargo and pipe?

"A Yes.

"Q Before the ship arrived in Bayonne, was this general cargo stowed on top of this pipe?

"A As far as I can remember, yes, there was some cargo stowed on top.

"Q Can you tell where that cargo was loaded onto the Green Port?

"A No, I could not tell you. We loaded in a lot of ports."

Line ten:

"Q At each port of discharge did you also load cargo?

"A Some of them, we did.

"Q What kind of pipe was down in the hatch when you went down there?

"A As far as I can remember it was pretty long pieces of pipe and probably three inches in diameter, something like that.

"Q What type of general cargo was stowed on top of that pipe?

"A General cargo, all kinds of cargo.

"Q Was this heavy cargo?

"A I couldn't tell.

"Q Was there any fence, chocking or bracing keeping this cargo on place while on top?

"MR. TORMEY: When?

"MR. LASOFF: When he went there."

MR. TESTA: If your Honor please, I have an objection at this point. Can we be heard on this, please?

THE COURT: Yes.

(At the side bar)

MR. TESTA: I am objecting to this question and this answer, your Honor, because this witness was not there and couldn't possibly know that because it is guesswork on his part.

THE COURT: Yes, I think it is.

MR. LASOFF: The answer you mean.

MR. TESTA: Yes. He couldn't possibly know that. He wasn't there. It is just guesswork on his part.

MR. SHIELDS: There was no objection made at the time.

MR. TESTA: I wasn't there.

MR. LASOFF: All objections are reserved.

THE COURT: You have a right to object now.

MR. TESTA: That is what I am doing.

MR. LASOFF: I don't want the question particularly.

THE COURT: It is hearsay. Whatever is hearsay is out.

MR. TESTA: I am objecting to this, too, Judge. The next question, five and six is also hearsay. He didn't know.

THE COURT: That should be stricken.

(In open court)

MR. LASOFF: Going to line eight:

"Q Did any longshoremen work at hatch number four on May 3, 1971?

"A Yes. According to the log book, number two, number five and number four hatches were working on that day, on the 30th.

"Q Does the log book reveal what part of number

four was worked on the 30th day of March, 1971?

"A No, sir.

"Q Is it customary in discharging a ship that you first discharge the upper 'tween deck or shelter deck before you go on to the lower 'tween deck, the lower hold to discharge?

"A Yes, sir. When there was a cargo for the same port to be discharged, we discharge the upper 'tween first.

"Q Was there cargo in the upper 'tween deck of hatch number four for discharge in the Port of New York?

"A Your question is: was there any cargo --

"Q In the upper 'tween deck of hatch number four for discharge in the Port of New York, that includes Bayonne, of course.

"A You want to know if there was any cargo?

"Q Yes, did you discharge any cargo from the upper 'tween deck in New York?

"A On March 30th we worked number four hatch in the afternoon. The log does not state whether it was the upper 'tween or lower 'tween on that day.

"Q I'm not asking you about the log book. I am asking you about the stowage plan and whether or not there was any cargo for discharge in the upper 'tween, number four,

"to be discharged at Bayonne.

"A I do not have the cargo plan. I couldn't tell you that.

"Q When you came down to the hatch after the accident, did you see any other general cargo that had been on these pipes where it had fallen on the deck?

"A I don't remember.

"Q Your record notes that the man had a fractured thigh or hip, whichever you want to call it. When you spoke to the longshoremen or hatch boss, did they tell you that the man had been struck by falling cargo?

"A If I remember correctly they mentioned something, that something had fallen on him.

"Q Did they mention that the general cargo which had been stowed on top of the pipes had fallen on him?

"A Probably did. Something fell on him. That box or something fell on him."

Skipping to line 22:

"Q When you went down in the hatch, were the cargo operations stopped or had they commenced again?

"A I believe they had commenced again.

"Q Was there any machine or machines, by that I refer to hilos, down in the hatch when you went down there?

"A I do not remember.

el/lf

"Q The Green Port, what kind of a ship is that?

"A It is a C-4 hull.

"Q What tonnage is the Green Port?

"A About 10,000 tons.

"Q How many cargo hatches?

"A Seven.

"Q How many mates were there on the Green Port in March of 1971? By that I do not mean engineering officers but I mean working mates.

"A Four working mates.

"Q Were any of them given liberty or leave in Bayonne when the ship arrived?

"A I do not remember but they were supposed to be on duty that date.

"Q When the ship arrived in port, did the master stay on board or did you get a port captain to supervise the discharge?

"A No, the master would be on board.

"Q Who was the master?

"A Captain Miller, I believe, was the master at that time, yes.

"Q The log says James Meems. Would that refresh your recollection, the abstract of the voyage?

"A Yes. Weems was terminated at the end of the voyage in Bayonne.

"Q On April 2, 1971?

"A I beg your pardon?

"Q The voyage terminated April 2, 1971? Bayonne?

"A (No Response)

"Q This is what your abstract says.

"A Yes. If the abstract states so, that must be correct.

"Q So I take it that no cargo was loaded on board the Green Port in Bayonne?

"A I beg your pardon. There is an entry on the 30th of March, Captain Thomas D. Miller relieved Captain James Weems.

"Q Was he to be the new captain on that ship?

"A No, he was the regular captain. He was on vacation. Captain Miller was returning from vacation.

"Q On the 31st Captain Miller would have been the master of the vessel? You say he relieved him on the 30th?

"A That's right.

"Q I take it that no cargo was loaded on board the Green Port in Bayonne?

"A No, sir, not as far as I remember.

"Q The previous port of call to Bayonne was Norfolk,

"Virginia?

"A That's correct.

"Q Were just discharge operations conducted in Norfolk or were they loading also?

"A I believe it was all discharge.

"Q Prior to that, the prior port was Charleston, South Carolina?

"A Yes, sir.

"Q In Charleston were they just discharge operations or was there loading as well?

"A I believe it was all discharge.

"MR. TORMEY: Can we refer to the back logs as to the dates?

"MR. LASOFF: Norfolk is the 28th, Charleston is the 26th.

"A The writing in the log is a little blurred. As far as I can tell in the log book it was all discharge operations.

The previous port was Balboa on March 20, 1971. I think in Balboa we loaded and discharged, is that correct?

"Q Where is Balboa -- California?

"A Pardon?

"Q Where is Balboa?

"A Arizona. It was discharging and loading.

"Q Was this cargo loaded into the number four hatch in Balboa?

"A There was cargo loaded in number four at Balboa.

"Q Does the log tell what kind of cargo?

"A No, sir.

"Q You would not have loaded steel in Balboa, would you?

"A I couldn't tell you. All it states is we started loading in number four.

"Q But as an experienced seamen it is not customary to load steel in the Canal Zone.

"A Usually it is vehicles that we load there, household goods."

I think Mr. Shields will stipulate that Balboa is not in Arizona.

MR. SHIELDS: That is a misprint, your Honor. Balboa, Canal Zone.

THE COURT: All right.

BY MR. LACOFF:

"Q As chief officer aboard the Green Port, what were your duties on March 31, 1971?

"A In charge of discharging the ship or loading,

"whichever cargo operations was being conducted at the time. At the same time, the maintenance and routine work on the ship.

"Q Was it a part of your job to supervise the work of the longshoremen to see that they discharged the vessel properly?

"A Yes.

"Q In connection with that job did you have the third mate on duty to see that they did discharge the cargo properly?

"A Right.

"Q If you or the third mate had seen any activity in the cargo hatch which you considered improper or unsafe would you have stopped the longshoremen from conducting those activities?

"A Yes, sir.

"Q At any time on the 31st day of March, 1971, did either you or the third mate have any complaint with the way the stevedoring operations were being conducted?

"A No, sir.

"Q When you went down to the hatch after you heard of this accident, did you take any photographs of the condition of the ship at that time in the lower 'tween deck of hatch number four?

"A No, sir.

"Q Did you have a camera on board the ship to take photographs of any accidents that occurred either to seamen or longshoremen in the course of a voyage?

"A Yes, we have a camera on board.

"Q Was that part of your duties as chief mate to investigate any accident either to seamen or longshoremen that occurred on board the Green Port?

"A Yes, sir.

"Q Did you make any sketches or diagrams with reference to this accident that occurred to Pasquale DeMauro on March 31, 1971?

"A No, sir.

"Q Was any cargo damaged as a result of this accident?

"A I do not remember.

"Q Was there any survey made as to any cargo claims as to damage at Bayonne?

"A Not that I remember.

"Q Did you, aside from the ship's log, prepare an accident report with regard to this accident?

"A No, sir.

"Q Did you have forms on board ship to report accidents that occur?

"A Yes, sir. To report accidents that occurred to the seamen aboard the ship.

"Q Besides the ship's log, did the master have his own log?

"A There is an official log kept by the master.

"Q When a seaman is injured aboard a ship, in order to get treated at a United States hospital, a marine hospital, he must get a certificate from the master, must he not?

"A That's correct.

"Q This is not the case with longshoremen?

"A No, sir.

"Q Do you know if the master's log or record has any reference to this accident of Pasquale DeMauro?

"A I do not know.

"Q Aside from this commander's abstract of voyage and the log that you have in your hands now, have you been shown any other record, a document, to refresh your recollection as to the accident that occurred to Pasquale DeMauro on March 31, 1971?

"A No.

"Q Any other ship's document?

"A Yes. Are you referring to any document whatsoever, whether they are ship's documents or whether they

"are the ship's lawyer's documents?

"MR. TORMEY: I will interject that I made a compilation of the Military Sealift Command Manifest for this voyage and Mr. Gonazlez reviewed this."

MR. SHIELDS: Your Honor, that particular document is under subpoena and will be here, if it is not already.

BY MR. LASOFF:

"Q Aside from the cargo manifest, were you shown any act of investigation done by the ship's lawyer or representatives with regard to this accident?

"A Yes, sir.

"Q What were those records? What were the documents that the ship's lawyer showed to you?

"A The document that I saw in the lawyer's office?

"Q Yes.

"A Some papers he had there referring to documents, legal papers.

"MR. LASOFF: Aside from legal pleadings, what did you show him?

"MR. TORMEY: Nothing, except the compilation that I made from the manifest and the previous cargo stowage plan from Honolulu.

"Q Would you look at the previous stowage plan

"from Honolulu and tell me if the pipes and general cargo that you saw on March 31, 1971, in hatch number four were on board the ship from Honolulu?

"A No, sir, I didn't see any pipe indicated in the plan here.

"Q In your experience with the ships of Central Gulf, when they pick up cargo at Oakland, California, was pipe usually a part of that cargo?

"A It could be anything.

"Q I know that. But I am saying, is pipe one of the commodities that you generally load in Oakland, California?

"A I'm not being facetious, but the work from MATS, that is an abbreviation for Military Sealift Command, would be any type of cargo. This ship was charged to the United States Cargo, the Military Sealift Command.

"Q Were the crew and officers and master all employed by the Central Gulf Steamship Corporation?

"A That's correct.

"Q Who gets up the stowage plan of these voyages?

"A (No Response)

"Q Is that done by the master or the chief mate or stevedore?

"A The question is who makes the stowage plan?

"Q Right.

"A The Army, Military Sealift Command.

"Q Does the master or chief mate have anything to say with regard to the stowage plan, to a proper stowage so that the cargo's weight will be evenly distributed?

"A Yes, sir.

"Q So the Army makes up a stowage plan; if it is not safe, you would oppose that plan and ask that it be changed?

"A Right.

"Q Did any cargo that was loaded on board the Green Port, while the plan might be made up by the Army, would also be with the approval of the master and the chief mate?

"A Yes, sir.

"Q With corrections along the way?

"A With corrections because of other cargo coming in and having to shift it, correct it if necessary. They make a pre-stow plan, submit that and we okay it, and then they make corrections accordingly."

MR. LASOFF: That is all I wish to read from the deposition.

THE COURT: Do either of you want to read any part of it?

MR. SHIELDS: Not at this time, your Honor.

MR. TESTA: Not at this time, your Honor.

THE COURT: Does that conclude the evidence you have here today?

MR. LASOFF: After reading that much, my brain is groggy, your Honor. I don't know what else I have to do now. We are going to stop at four and start again tomorrow?

THE COURT: Yes. Do you have anything else now?

MR. LASOFF: Not that I can think of right now.

THE COURT: We will suspend until tomorrow at ten o'clock. Keep an open mind, don't make up your mind now. And don't discuss the case.

(The jury left the courtroom.)

(Adjourned to February 26, 1974, at 10:00 A.M.)

PATRICK DE MAURO

vs.

CENTRAL GULF SS CORP. 72 Civ. 636

vs.

INTERNATIONAL TERMINAL OPERATING CO.

February 26, 1974
10:15 A.M.

(In open court - jury present)

THE COURT: What I am about to say is not intended to be critical, but informative. One of the judges figured out, and this was before a lot of these rates increased and everything went on, that in order to open up this door, it costs the government $3,000. If we use fifteen minutes of that time waiting on somebody to show up, it means that we are just wasting the taxpayer's money. I can understand that sometimes in a town like this you get hung up. But I would suggest to you that you plan that you may get hung up when you make your time schedule. That is why I always carefully tell the jurors what we are doing and when we are doing it. That is why I told you yesterday that we would start at ten o'clock. Keep that in mind. As I say, it is not intended to be critical, but merely informative.

All right.

MR. LASOFF: Dr. Seaman, would you take the stand,

please.

GEORGE S. SEAMAN, called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LASOFF:

Q Dr. Seaman, are you a physician duly licensed to practice medicine in the State of New York?

A I am.

Q Do you maintain an office for the practice of your profession?

A I do.

Q Where is that office located?

A 99 Lafayette Avenue, Brooklyn.

Q Would you give us a synopsis of your professional training, your hospital connections, your teaching connections, if any?

A I graduated from St. Louis University School of Medicine in 1940. I had service in the Army, internship and residency after that. Started private practice as a specialist in orthopedic surgery in 1949. At the present time I am chief of orthopedic surgery at the Swedish, Samaritan, Lefferts General, Menorah, and Williamsburg General hospitals, all in Brooklyn. I am associate professor of orthopedic

surgery at the New York Medical College, I am certified by the American Board of Orthopedic Surgery and an examiner of that board. I am the impartial specialist for two agencies of the federal government in this area. My biography is listed in "Leaders in American Science," in the "International Record of Biography," "American Men of Medicine," and in "Who's Who in America."

Q Doctor, I take it that your practice is limited to orthopedic surgery?

A It is.

Q Would you tell us what the field of orthopedic surgery covers?

A It is that specialty of medicine which pertains to the moving apparatus of the body. The bones, joints, muscles, ligaments and tendons and the nerves that influence them.

Q Doctor, at my request did you examine Mr. DeMauro?

A Yes.

Q Can you tell us when you examined Mr. DeMauro?

A On November 5, 1973.

Q Would you tell us what your examination consisted of and what your findings were?

A A history was taken, that is, the patient was asked what had happened to him and the general range of events after-

ward, and how he felt at the time or generally around the time he was examined by me. He was asked about prior injuries. He was examined for the area of injury, X-rays were taken, and then a diagnosis was made after X-rays and a report was sent.

Q Doctor, on your examination what were your physical findings?

A On examination, he walks with a limp, favoring the right lower extremity. There is a linear scar on the antero-lateral aspect of the right femur. That is on the front and outside of the right thigh. There is a fairly long scar on the lateral or outside aspect of the right buttock. There is some right quadriceps atrophy. That is a major muscle in the thigh and that muscle is weaker and softer than on the opposite side. There is some weakness of right knee extension. Extension means straightening out and he couldn't straighten out the right knee as strong as normal or on the other side. There is some instability in the right knee. That means that the knee which should normally move straight up and down, when I tried to move it it does wobble from side to side and that knee is unstable. There is some pain on the tests for instability. Tenderness is located in the lateral or outside aspect of the right lower femur, flexion or bending of the right knee is slightly limited and painful. There is some restriction of right hip motion with pain.

Q Doctor, you, yourself, took X-rays at the time of this examination, did you not?

A Yes, they were taken in my office under my supervision.

Q And you, yourself, read X-rays?

A Yes.

Q Do you have your X-rays with you?

A Yes.

Q Would it be of some help to the jury if you had a shadow box to show them what you are talking about on the X-rays?

A Could be.

MR. LASOFF: Do we have a shadow box, your Honor?

THE COURT: Yes.

(Pause)

Q Doctor, would you tell us what these X-rays revealed and if possible show the conditions you are referring to at X-rays?

THE COURT: Mark them.

(Plaintiff's Exhibits 9, 10, 11, 12 and 13 marked for identification.)

xxx

THE COURT: Before he starts to read from any of them, lay a foundation for their introduction into evidence

because if they are not in evidence naturally he can't read from something not in evidence.

Q Doctor, these X-rays were taken in your office under your supervision?

A Yes.

Q And they were read by you personally?

A Yes.

MR. LASOFF: I have them in evidence.

THE COURT: Do they have markings on them indicating the date that the X-ray was taken and the patient's name?

THE WITNESS: They have markings of the date and the patient's number which matches the number on his chart.

THE COURT: That appears in the X-ray itself?

THE WITNESS: Yes, your Honor.

THE COURT: Show it to the defendant and also the third party defendant, if they have any objection.

(Pause)

MR. SHIELDS: The defendant has no objection.

MR. TESTA: No objection.

THE COURT: Received.

(Plaintiff's Exhibits 9 through 13 received in evidence.)

xxx

THE COURT: Doctor, when you talk about any of

these, will you keep mentioning the number you are talking about, and also what portion of the diagram you are talking about, to the left or right, upper or lower, or whatever you are referring to?

THE WITNESS: Yes, sir.

Q Doctor, you can go to any one of these X-rays that you think is significant and tell us what the X-ray shows to you with regard to the bone structure of that leg.

A This is Plaintiff's Exhibit 10 and it shows the right thigh or femur at the upper portion of the plate is the hip bone and the heavy white structure down the middle is the femur or thigh bone. It shows a healed fracture of the femur. What had happened in this patient was that there was a fracture, break in the bone right across approximately its middle. And the doctors had put it together by a metal-like device known as a Kuntschner Nail. It is a long rod that extends from the top of the femur down to almost the bottom and joins and fastens the two fragments together. If the two fragments are close enough they will knit, leaving this empty track in the middle. There is some irritation from the nail and that is why there is excessive bone growth around the femur. This bone growth does not bother the patient. It is not helpful to him but it is not the cause for his trouble. Visible in this film and better visualized in the film

center is a bone fragment at the upper end of the hip. In the technical method by which it is done, in which a heavy -- it is not as heavy as the rod, piece of metal, roughly 3/16 of an inch thick is driven up the femur after the fracture is exposed. And then this is drilled to accept the nail which comes from the top down. A piece is often left out of the -- or driven out of the femur, and this piece of bone, or calcification, it is difficult to tell which on this X-ray or in any X-ray, is outside the hip and interferes with the motion of the hip. This is bothersome to the patient, interferes somewhat with function but is not the major cause for this patient's disability.

Q Doctor, in that X-ray you showed us, of course, the pin has been removed at this time, is that correct?

A Yes.

Q And that hollow space is where the pin had been before they removed it?

A That's correct. This is a view of the hip -- this is Plaintiff's Exhibit No. 9 and it is taken with centering on the hip joint. And it shows the bone condensation in the upper end of the femur where the nail was. This was a heavy nail. The diameter of it varies from patient to patient but in this X-ray it looks to me like about half an inch, between thirteen and twelve millimeters. And the

bone condenses and forms a little scarring right around it and there is the track of the nail going all the way down. There is the bony overgrowth of the femur and at the upper end is this extra piece of bone which as I said interferes somewhat with the motion of the hip. This is a lateral view of the same femur that you saw before. This is Plaintiff's Exhibit 11. When we take X-rays we have to take at least two views, the first one you saw going from the front to the back and this one going from side to side. It shows the same thing, the track of the nail and the bony overgrowth in the middle of the femur. The other two films, Plaintiff's Exhibit 12 and 13, are X-rays of the knee and in the A.P. view, that is from the front to the back, you can see the knee and you can see the track of the nail where it left a bone scar going down to almost the lower end of the knee. The bone scarring is not disabling to the patient.

THE COURT: What is the A.P. view?

THE WITNESS: That is from front to back.

THE COURT: Thirteen or twelve?

THE WITNESS: I'm sorry. The A.P. view is Exhibit 13. The lateral view is the same thing and doesn't add any information to what has already been described.

Q Based on your physical examination and your X-ray examination, did you come to a diagnosis as to what injuries

Mr. DeMauro was suffering from?

A Yes.

Q What was your diagnosis?

A Healed frature of the right femur with a large bone fragment in the right hip muscle, and instability of the right knee because he had biquadriceps atrophy.

Q Doctor, is the right femur in layman's language the thigh bone?

A Yes.

Q Is that bone much larger and thicker than either of the bones in the lower leg?

A Oh, yes. It is heavier than both of them combined.

Q In addition to this fracture of the femur, Mr. DeMauro also had a fracture of the upper fibula. That would be the small bone in the leg, wouldn't it, Doctor?

A Yes.

THE COURT: Wait a minute. He didn't agree with that or disagree with it at this point. Was there a fracture there?

MR. LASOFF: It is in the hospital records, your Honor.

THE COURT: It may be in the hospital record but we are talking about what he is talking about.

THE WITNESS: Let me look back at the X-rays. I

may have missed it because I was not aware.

(Pause)

A It is not visible in these films and I was unaware of it at the time I examined him.

Q Assume, Doctor, that a man in 1971 then 44 years of age was working as a longshoreman on board a ship known as the Green Port --

THE COURT: Just a minute. Are you, either one of you, going to use the shadow box?

MR. SHIELDS: No, your Honor.

MR. TESTA: I don't know, your Honor. I may.

THE COURT: It sort of bounces around sometimes and isn't on a very steady pedestal. Will you take it down so we don't have it bouncing around?

(Pause)

THE COURT: All right, Mr. Lasoff. What is about to happen here is that the doctor is going to be asked what is called a hypothetical question. Ordinarily witnesses can only testify to what they know from their own experience and what they have heard, smelled, touched or by use of their senses. When a man has special knowledge, an expert in some area, he is allowed to testify because he knows more about this area than I do or you do or the lawyers do, and, therefore, can give an opinion. The opinion must be based upon the

facts as you find them, however, So just carefully listen to the question and if you find those facts to be in accord with your recollection of the facts, then you may consider his opinion. His opinion, by the way, is only advisory. It is not conclusive upon you. It is simply advisory.

Q Doctor, I show you the hospital record and the X-ray reports and I ask you to read the X-ray report with regard to the femur and explain what the initial X-rays reveal.

A Right femur. There is a transverse fracture of the midshaft of the right femur with external rotation of the distal fragment and medial angulation. There is also a fracture of the head of the fibula, which is undisplaced. The remaining visualizes bones in the femur and lowr leg are intact. This means as follows: that in the middle of that large bone, in the thigh, the femur, there was a fracture. The radiologist describes it as transverse, and this means that the two fragments are generally horizontal with respect to the long axis of the bone. As distinguished from this, would be an oblique fracture or a spiral fracture. External rotation of the distal fragment that he described means that the lower portion of the lower extremity is turned outward. This is because of muscle pull or gravity or the weight of the leg. And you can see that on the X-ray sometimes. Medial

angulation is the term that we use to describe the way the bones are displaced at the time that the X-ray is taken. In this case the bones are broken at the middle and the angulation, the apex of where the bones point is medially or toward the inner side. The fracture of the head of the fibula is the small bone just below the knee, and the fracture is in the expanded upper end of the bone and is not displaced. It is a crack through the bone.

Q Doctor, this operation, this nail that was put into Mr. DeMauro's leg, was that the type of operation that was known as an open reduction?

A Yes.

Q There is another type of orthopedic treatment known as a closed reduction. Would you explain the difference between the closed reduction and an open reduction?

A A closed reduction is one in which we pull or press or manipulate the fractures, the bones in some way to get them into what we feel is acceptable position and then cast is applied. An open reduction is one in which an operation is done, incisions are made through or between the muscles, obviously, through the skin down to the bone. The bones are visualized and realigned and in questionable cases X-rayed in the operating room and usually or almost invariably some metallic device, a plate, a band, a wire, a rod in this case,

or anything else, is applied to the two bone fragments holding them. And then in most cases but not this one, a cast is applied.

Q Doctor, can you tell us the operative procedure, the way that that nail was put into Mr. DeMauro's leg?

A It is a most ingenious one devised by a German orthopedist --

THE COURT: Wait a minute, Doctor. Do you know that this is the method that was used in this case?

THE WITNESS: Yes, your Honor.

THE COURT: How do you know that, from the report?

THE WITNESS: There is only one method that can be done. With the incision. There are newer modern methods but it was not used in this patient.

THE COURT: All right. What I am suggesting to you is, we don't want what is usual but what you feel was done in this case.

A In this patient. An incision is made in the antero-lateral aspect of the thigh. That is the front and out aspect and it goes through the skin and through the tissue beneath the skin called the subcutaneous tissue and then through the fascia, which is a broad band of fibrous tissue that encloses the muscles. And then in between the muscles and they divide some of them in the line of their fibers until the two bones

are approached. The two bone ends are identified and brought up into the wound. And then a long rod -- I don't know the exact measurements of the rod but it is roughly about a yard long, it has a little --

THE COURT: Maybe we can help you. At least the plaintiff volunteered yesterday to bring the rod today.

THE PLAINTIFF: I didn't bring it. It is about eighteen inches.

THE WITNESS: No, I wasn't talking about the rod in the femur. I am talking about the guide wire. The guide wire is a metal-like rod 3/16 or a wee bit less than a quarter of an inch round. It has a point at one end and a sort of a semaphore-type flag with a hole in the flag at the other end. This is placed upon a hand drill just like a carpenter's drill and we drill that up the shaft of the femur and it comes out the buttock. I know, it is gruesome in a way, but the patient is under anesthesia. And then an incision is made in the buttock to identify where the nail comes out. And then a special instrument is put on the hand drill. It consists of a -- we call it a **trephine.** It is a hollow drill which goes over the rod, over the guide wire and down into that little socket in the upper end of the femur that you saw where the bone fragment was. And it drills the hole in the upper end of this femur. Then the rod is shaped like a

cloverleaf. It is hollow in the middle, and it is placed over the guide wire and hammered down into the upper fragment until it appears at the lower fragment. When it appears at the lower fragment, the guide wire is extracted from the upper fragment and now the upper section of the bone is controllable completely by the rod in it. But the lower fragment is controlled only by the manipulation of the surgeon or if it is fixed in a special table. The fracture is reduced manually by looking at it. You see it, put the two bones together, and drive the guide wire down into the lower fragment to stabilize it, and then drive the Kuntschner nail over it until it seats firmly in the lower end and the two fragments are securely held together. The two fractures are then pushed together, if there has been any separation and then the wound is closed, the muscles put together, the fascia and the subcutaneous tissue and skin. In this patient and in almost all of them who have this operation, a cast is not necessary.

Q Doctor, when you use the word hammer and drive, you quite literally mean hammer and drive, do you not?

A Oh, yes, we use a heavy weighted -- we call it a mallet, it looks more like a hammer than a mallet, but a hammer can be used. We bang it.

Q Doctor, I believe in February 27th of 1972 or thereabouts this nail was removed from Mr. DeLauro's leg. Can you

tell us about that procedure?

A Yes. An incision is made in the upper buttock in the general area of where the incision was made to put it in. But it has to be larger because now we have to find the end of the nail. The end of the nail just sticks out of the hip just a little bit. And we make the incision through the skin and then with a finger go down there and hope to feel the metal. And sometimes we do, and if not, the incision is enlarged as in this patient. And then the nail comes equipped with an eye, a hole in its upper end. There are a variety of devices available to us. We put a hook in the upper end and it has a complicated C arm, and the back end of the C arm there is a plate and we hit that thing and out comes the nail. Sometimes easy and sometimes hard. But it comes out if you hit it hard enough.

Q Doctor, I think you said sometimes it has to be enlarged, as in this patient.

A Yes. The incision in this patient's buttock to extract the nail is much, much larger than that needed to insert the nail, and I am positive that they enlarged the original skin incision.

Q Doctor, I want you to assume that on March 31, 1971, Patrick DeMauro was then 44 years old and was working at that pier in Bayonne, New Jersey, known as the Bayonne

Military Ocean Terminal, that on that date he was sent to work aboard a ship known as the Green Port in hatch number four, lower 'tween deck thereof. That about a half hour after he commenced work there three or four large cases weighing 700 pounds each toppled and fell on him, that he was buried by the cases, that he was dug out, put in a stretcher, taken off the ship to the pier, put in an ambulance and taken to the Bayonne hospital where he was admitted and his injuries were diagnosed as a fracture of the right femur and a fracture of the upper end of the right fibula. In your opinion, Doctor, with reasonable medical certainty was this accident a competent producing cause of those injuries?

A Yes, I believe it was.

Q In that hospital an open reduction was performed on the fracture of the right femur and a nail or pin was put in that leg. Was the accident the competent producing cause of the need for this pin?

A Yes.

Q Doctor, in the initial stages before surgery, before anything else, when there is a fracture of the femur, is that a painful injury?

A Oh, yes, it is.

Q This operation, we know that it is done under general anesthesia or a spinal, but after you come out of it,

is there pain?

A Yes.

Q What type of pain is there and what parts of the body are affected by this operation?

A The pain will be at the operative site and the femur where the incision has been made through the skin down to the fascia, muscles and bone, and in the buttock where there has been an incision to place that guide wire and nail in it, and this thing hurts.

Q This insertion of pins and nails, is that a more modern practice than the use of casts?

A Casts have never been used in the treatment of fractured femurs for, oh, I don't know, it is since plaster of paris was invented. It was known that casts would not work in the treatment of a fractured femur.

Q Is that because the muscles in the thigh are too powerful and would separate the fragments?

A Partly. Also because the muscles surrounding the thigh are too heavy and you can't really get a good cast immobilization. The muscles would contract and displace the fracture and result in severe shortening. In those few cases such as occurred in treatment with either untrained physicians or for any number of reasons that casts were used, the results were disastrous.

Q Doctor, this patient apparently remained in the hospital for some 24 or 26 days. Was that the normal period of recuperation for this type of operation?

A For this age, yes.

Q After he got out of the hospital he was apparently given a walker in the hospital and crutches, and he left with the walker and crutches. Is that customary?

A Yes.

Q He then said that he was on the crutches for some two or three months after he got out of the hospital. Would that be a customary length of time to use crutches after that operation?

A Most patients will use it longer than two or three months.

Q He said that after he discarded the crutches he then used a cane for about two or three months. Assuming that he only used the crutches for two or three months, would that be a normal period of time for the use of the cane?

A Most patients will continue to use a cane or crutches for close to a year after the initial injury and operation.

Q Doctor, based on the hospital record and your examination of this patient, at the time you examined him

what was your feeling with regard to Mr. DeMauro's capacity for work as a longshoreman?

A As I understand the normal duties of a longshoreman, he cannot do work involving prolonged standing or crouching or bending or lifting or climbing of ladders. He cannot walk on uneven surfaces. I would not want to pose as an expert in longshoremen's duties and I can only say that is what he can't or shouldn't do -- really can't do for long periods of time. It is conceivable that there might be jobs down at the docks which do not require it, but that is not within my field of knowledge.

Q So to resum, he can't bend or stand for long periods of time or lift or climb ladders or stairs or walk on uneven surfaces, is that correct, Doctor?

A Basically, yes. The big difficulty is the -- he can walk stairs slowly. He can go up and down and I am sure he does now. Ladders are difficult for him. He can do each of those things but to work anywhere near an eight-hour day even with good rest periods is more than he can do and it would be unsafe for him specifically to climb ladders or to carry weights up and down stairs.

Q Doctor, your examination of Mr. DeMauro took place at least two and a half years after this accident, is that correct? The date of the accident is March 31, '71.

A Yes.

Q At the time of your examination, was it your feeling that Mr. Delauro's condition would remain the same, that it would improve or that it would get worse?

A I believe it is permanent. Any hope for any significant improvement, I think, is whistling in the dark and futile.

Q Doctor, you mentioned quadriceps weakness. Would you tell the jury what that is?

A The major controlling muscle of the knee is called the quadriceps, it stands for four heads. It is because the muscle has four separate components, all of which arise from the hip or femur and go down to the knee. When this muscle is intact and normal, we can walk normally. We can bend normally, we can go up and down stairs normally. When this muscle is weak or distubed, it disturbs the mechanism of the knee so that the use of stairs is very difficult, bending is difficult, and there is a weakness of the knee. The knee itself has no natural stability, not quite like the hip. The hip is cup shaped and even if the muscles were completely weakened at the hip, the hip will not wobble or dislocate. But the knee has two flat surfaces that oppose each other and the quadriceps mechanism, the muscles, holds the knee housing snugly so that it doesn't wobble. When the quadriceps is

weak the knee will wobble as it does in this patient. And this wobbling is perceptible easily to an examiner and is the cause for the patient's pain in walking and the reason why he limps. He limps because in the walking gait he has pain even though he may not feel it, it may be lower than a conscious level pain, but he attempts subconsciously to get his weight off that leg so that the time interval spent in the standing phase, when the foot hits, is less and, therefore, the gait is nonsymmetrical, or limping. But the quadriceps mechanism is his present problem. It is weak, it cannot be significantly improved by even a very prolonged series of exercises, and I fear that that is his problem. He will not be able to climb ladders or descend or use steps for prolonged periods.

Q Or bend?

A He can bend a little bit. But with a knee like this, if he has to bend a great deal it will cause him so much pain that he wouldn't be able to do it for a long time. Once or twice or ten times he can do it. Not all day.

Q Let's forget for a minute that Mr. DeMauro is a longshoreman and let's consider him as a manual laborer. Could he perform a day's work as a manual laborer?

A Not in construction, but there are many tasks that he certainly well could do, and I don't mean to use the word manual in its exact dictionary instance. Obviously he could be

a jeweler which requires almost no use of the lower extremities. It would be extremely difficult, close to impossible for him to do thework that is usually done by plumbers or carpenters. Certainly not construction men. I just -- I suppose there are manual tasks at bench work. I'm sure there are manual tasks at bench work that he can do but work involving the use of his lower extremities, in competetive industry, which would involve prolonged standing or walking or walking on uneven ground or bending or lifting or climbing of ladders or stairs is more than his current or future expected capacity.

Q Doctor, in your opinion is Mr. DeMauro's condition permanent?

A Yes. I should amend that. I think he could get some help but it is now -- it was two and a half years when I saw him and it is now almost three years -- well, a little less than three years since his injury and I didn't make any recommendation when I saw him for a series of exercises and I honestly doubt that he could get any significant relief by a prolonged series of exercises.

Q Doctor, Mr.DeMauro has testified that he has a dull pain all the time, but that if he stands or walks for any period of time this pain becomes sharper. In your medical experience and with your knowledge of the injury that Mr.

LeMauro sustained is that a reasonable complaint and a reasonable sequence of events?

A Yes.

MR. LASOFF: No further questions.

CROSS EXAMINATION

BY MR. CHIELDS:

Q Doctor, you didn't give any treatment or suggestion to Mr. LeMauro, did you?

A No, I did not.

Q You examined him for the sole purpose of coming here to trial to testify in his behalf, is that right?

A Oh, no. I examined him for what I would call evidentiary purposes or evaluation. I had no idea at the time I examined him that I would be testifying, although that is always a possibility.

Q You have examined patients for Mr. Lasoff before, haven't you?

A Yes.

Q And you know that the purpose of those examinations is to advance his cause in litigation?

MR. LASOFF: Objection, your Honor.

THE COURT: Overruled.

MR. LASOFF: I am objecting to the characterization, not the question.

THE COURT: I realize that. I think that is the same way the jury would put the question: does he have an interest here which would affect his testimony. That is what it amounts to. And in effect he is saying you didn't come here to hurt him, you came here to help him, in effect.

THE WITNESS: Can I hear the question?

THE COURT: Read the question.

(Question read)

A It is not exactly. The patient comes to my office and I examine and will send a report. I have the feeling that many times the report does more to hurt him than to help him.

THE COURT: Yes, but then when he calls you to come to court and testify, you then realize that he likes your report, right?

THE WITNESS: Yes.

THE COURT: Otherwise he wouldn't call you and pay your fee.

THE WITNESS: He would pay the fee --

THE COURT: The fee you are getting to come here today, not the examination. You are getting paid to come here today.

THE WITNESS: Yes, your Honor.

THE COURT: He is paying for that, isn't he?

THE WITNESS: Oh, yes, he is. But the question concerned only the examination.

MR. SHIELDS: You have answered the question, I believe.

Q How much time did you, not your nurse and not your technicians, how much time did you spend with Patrick DeSauro on November 12, 1973?

MR. LASOFF: May we amend the question? It is November 5th, I believe he said.

Q I beg your pardon. November 5th is correct.

A Not counting interruptions, I would say between 20 minutes and a half hour.

Q What did you do during that 20 minutes?

A Well, at first --

Q You took a history, didn't you?

A I don't take them personally. They are taken while I am in the room, by my associate, who is my wife, and I am in the room and aware of it. I verify it. I personally examine, of course, and that examination is transcribed by a secretary who is in the room at the time of the examination, and then I personally conduct the patient to the X-ray room and from then on I may see the patient for just a few seconds or may not. But then I see the X-rays and prepare a report.

Q Did you take any measurements of this man's lower extremity?

A No.

Q You didn't attempt to compare the right to the left?

A Well, I didn't make a note as respects to leg length, but leg lengths are equal or I would have made a note that they aren't. I didn't specifically measure the girth or the circumference of the thighs.

Q Could we assume, therefore, that based on what you said about the length, could we assume that the lower extremity and the thigh, the knee and below, appeared to be equal?

A No, because I make a specific mention in the report that there is quadriceps atrophy and that is indicative that the right side is thinner and smaller and softer than the other side.

Q How much smaller?

A I did not measure it because measurements are severely unreliable.

Q What is atrophy?

A It is a softening or weakening of the muscle.

Q Is that a result usually of inactivity of that particular muscle?

A It is one of the causes, or inactivity is one of the causes, yes.

Q Was that the cause in this instance?

A Not the only cause. The causes were first the injury, when the femur is fractured, there is also an injury to the muscle. Second, the operation with the incision going through or between the muscle, then the inactivity after the operation. And it is standard that when a patient sustains an injury like this, quadriceps atrophy of a very severe degree occurs.

Q When you have a patient of your own, not a man who you examine for the purpose of coming to court to testify, but when you have one of your own, don't you prescribe exercises?

A Yes, I do.

Q Therapy of some sort?

A I do.

Q And this tends to build up thequadriceps muscle?

A Yes.

Q With these exercises you would expect to have a normal leg as a result, or a near normal leg?

A Yes --

Q Certainly with a fracture it is never normal.

A With a fracture with bone healing such as this, if the exercises had been done and supervised and watched

carefully by a physician or his trained assistants, a close to normal result could have occurred. They did a beautiful job on the bones.

Would you call this a --

MR. LASOFF: Your Honor, the doctor was still testifying.

THE COURT: You sort of interrupted him a little. He hadn't finished, Mr. Shields.

A They did a beautiful job on the bones. They didn't do so well on the muscles.

Q Did you weigh Mr. DeMauro at the time of the examination?

A No.

Q Did you look at him and did you determine that he was obese?

A I didn't make any notes of that.

Q Would the man's weight have anything to do with his problem?

A If a patient is -- the answer is yes, if he is excessively obese, it would hinder his recovery. But it would not prevent a good recovery.

Q Here it has been, it is in the hospital record, I believe, and it may have been testified to that the man is 5'5" and he weighs 230 pounds, and he has carried that

weight for many years, except for a short period of time when he took some off then put it right back onagain. Would you classify him as obese?

A 5'5" and 230 pounds is a fat man, obese.

Q Excessively obese?

A He has got a lot of extra weight. I would say as a rough guess 60 pounds, something in that range.

Q Medically --

A Medically he is a fat man and obese if those are the figures as you gave them to me, yes.

Q Doctor, had he lost weight following the accident would that have aided in his recovery?

A It is a complicated answer. It could be both yes and no. Yes, the decreased weight would make it somewhat easier to regain his strength. No, that the decreased weight would also be a loss of strength.

THE COURT: What is the nature of the exercises? Is it whirlpool baths or something you can do in the house or something you have to go and get some place?

THE WITNESS: It is not whirlpool but it can be done at home with very simple equipment. But it should be supervised at least on a fairly regular basis by either a therapist or a physician. And they are so commonly done for a whole host of conditions in orthopedics that our technicians

know them and supervise them.

THE COURT: I think most of us recognize the so-called exercise you can do to so-called strengthen your back. We know that you can lie on the floor and make your spine go down and do the various things you can do. How about the knee? What can you do with the quadriceps?

THE WITNESS: The patient sits on a table with his foot not on the floor. Usually we tell them to sit on the kitchen table or there is the use of a pillow underneath the lower thigh to raise the knees so that the leg doesn't drag on the floor. And then the knee is straightened. This is the mechanism of the quadriceps. After it is straightened, he is supplied with or buys some weights, starting with two pounds and increasing up to 30 pounds. By the time a patient can raise 30 pounds 30 times he will have a normal knee. But this program may take a year of six times a week activity twice to three times a day.

Q Doctor, the hospital record indicates that Mr. DeMauro suffered a fracture of the fibula. You tell me if I am wrong, I read it as a simple fracture. Is that a proper description?

A The fracture was certainly not complicated and it was not compound. We don't like to use the word simple. It is a closed fracture. The older terminology is simple. But certainly the fracture of the fibula is minimally the cause

for his trouble.

THE COURT: Was that at one time called a green stick fracture?

THE WITNESS: No. Green stick fractures are applied to children. This is a nondisplaced fracture as I read it from the reports, of the head of the fibula.

Q You were completely unaware of it until this morning when it was pointed out by Mr. Lasoff?

A That's correct.

Q So that, therefore, it would be of no significance in your opinion which you rendered for Mr. Lasoff's office?

A Very little. The fracture of the fibula might be concomitant with a tear of the medial collateral ligament. In other words, there was almost surely with a fracture of the head of the fibula a knee injury at the same time that he had the fracture of the femur, and this was one of the reasons why his knee mechanism isn't working properly now.

Q But you were unaware of that and you didn't even consider it in your opinion?

A That's correct. I was unaware of it and did not consider it.

MR. SHIELDS: I have no further questions.

CROSS EXAMINATION

BY MR. TESTA:

Q Dr. Seaman, you examined Mr. DeMauro on November 5, 1973, is that right?

A Yes.

Q Did you have the Bayonne hospital records before you at that time?

A I had been furnished with -- the answer is no, I did not.

Q Did you have any medical reports before you at that time?

A I had a photocopy of an attending physician's report signed by Dr. Sidney Chayes. The photocopy is not completely clear.

Q Is that the only medical report that you had for consideration at the time that you examined Mr. DeMauro on November 5, 1973?

A Yes.

Q Did you ask for the hospital records?

A No.

Q Did you think it would be of any significance for you to know what the hospital found in connection with your examination and findings?

A Not really. I felt that my examination was for the purposes of evaluation of the patient as of that time. I would only be very distantly interested in exactly what trans-

pired at the hospital, more than I already knew.

Q And the purpose of your examination was for evaluation so that you could testify here in court today, is that right?

MR. LASOFF: Objection, your Honor. He has already testified that was not the purpose of his examination.

THE COURT: He will simply say no, then, wouldn't he?

THE WITNESS: It is half and half yes and no, your Honor.

THE COURT: The question has been answered. The purpose of the examination was for evaluation. He might or might not be called upon to testify.

THE COURT: But it certainly wasn't for treatment, was it?

THE WITNESS: No, sir, it was definitely not for treatment.

Q As a matter of fact, you didn't recommend any treatment, did you, Doctor?

A That's correct, I did not.

Q However, you did take some X-rays?

A I did.

Q And the X-rays that you took which you have shown to us in the shadow box indicated excessive callus formation

at the fracture site, is that right, Doctor?

A Yes.

Q And you said that that did not bother Mr. DeMauro?

A Very minimally. I don't believe I said it didn't bother him at all. I said that it bothered him so little so as to be nondisabling.

Q What is excessive callus formation, Doctor?

A You have seen that on the X-ray, where those two bones are joined together, there is an extra bone growth around the prior fracture site which is excessive and more than is needed for the fracture healing.

Q As a matter of fact, that makes the bone stronger at the fracture site than it was before, doesn't it, Doctor?

A That is a debatable issue and there are answers both yes and no. It is not a simple answer.

Q What would you say?

A It is both yes and no. If the bone is solid bone at that point you would think it stronger, but when re-fractures occur and they do occur --

Q I didn't ask about refractures --

MR. LASOFF: If your Honor please, he asked a question which calls for this answer.

THE COURT: Yes. You asked a "why" question and

when you do you are in trouble.

A It is not stronger even though it may look stronger, because when refractures occur in the femur they occur right through the zone of the previous fracture. Even though it is thicker, it may not be stronger.

Q There is no indication of any refracture here, is there?

A No.

Q So is it fair to say that if you have excess calcium at the fracture site that it is stronger?

A I just answered it. That it is not stronger even though it appears to be thicker. Because when refractures occur, they occur at the same point again.

Q But that doesn't bother him?

A No; minimally that is not really his problem.

Q I think you said in response to some questions by Mr. Shields that the doctors who did this procedure which you had described in great length before, did an excellent job.

A On the bones, they certainly did.

Q They put these bones right back in the same place they were before, didn't they, Doctor?

A Yes.

Q And I think you even demonstrated with your hand,

showing one hand on top of the other the position of those bones after the fracture, is that right, Doctor?

A They did a good job.

Q Excellent job?

A On the bones, perfect.

Q And that is reflected in the X-rays you took, isn't it, Doctor?

A Yes.

Q That excellency that Dr. La Peluso did, who was the doctor, by the way, who did the job you described?

A The technical work of the operation on the bones was perfect -- well, perfect at the midshaft. That bone fragment at the upper end is a little less than perfect, but at the fracture site you couldn't ask for any better.

Q This bone fragment that you referred to at the upper end, does that have any effect at all on the hip?

A I think it disturbs the mechanism of the hip in that it causes some restriction of motion and some pain in the hip and some pain on use. But it is not disabling. If this were all he had I don't think, but I can't be sure, I don't think he would be prevented from doing the work of a longshoreman.

Right. Thank you. You spoke about bone condensation in the channel where this long rod was inserted, right?

A Yes.

Q And you said that that was not disabling?

A That's correct. Nor symptomatic, nor bother him in any way.

Q Doesn't bother him at all?

A That's correct. It is an X-ray finding. It bothers him no more than any scar in your body or mine.

Q The fact that they put this rod in and then took it out again and left a channel there which in turn indicates bone condensation is of no significance?

A That's correct. Of no significance at all.

Q Did you make any other notes in connection with your examination of Mr. DeMauro on November 5, '73, other than your report of November 12, '73?

A Well, when the patient comes to my office he is examined and we make up a chart and the report is then transcribed from the chart. The report is a little more exhaustive than the chart itself because the chart does not contain the X-ray readings. A carbon copy of the report is kept in my office and accessible to me. But the office chart is transcribed exactly into the report, of which you have a copy.

Q Did you bring any other notes with you other than your report of November 12th, Doctor?

A I brought the original office chart and the financial records.

Q Your attention was directed to the Bayonne hospital report which talks about a fracture of the fibula. You said that is not visible in your X-rays, is that right, Doctor?

A Let me look again. I took a quick glance at them before, but I don't think it is visible.

(Pause)

A I still don't see it.

Q However, you did see it in the Bayonne Hospital records?

A I saw it in the records, yes.

Q That is described as a crack, is that right?

A Yes.

Q Is that a linear fracture, Doctor?

A I know that that X-ray report was in here but I can't find it again.

MR. LASOFF: Can I help you, Doctor?

THE WITNESS: Yes.

(Pause)

A They don't say whether it is linear or not. They say just a fracture of the head of the fibula.

Q But a crack would be linear, wouldn't it?

A Not necessarily. It could be a jagged, irregular line. It could be any number of things not a linear fracture.

Q But it would be a line, wouldn't it?

A Usually when we say linear we mean a fairly straight line. This fracture need not necessarily be a fairly straight line.

Q Straight or crooked, it would be a line, though, wouldn't it?

A The answer is yes and no, again. We use the word linear fracture to mean a straight line fracture, not a crooked line fracture. I realize that may not be the perfect use of the word, but that is the way we use it.

Q However, the hospital speaks of a transverse fracture of the femur?

A Yes.

Q And you have demonstrated with your hands what that was, didn't you?

A Yes.

Q One hand on top of the other?

A Yes.

Q Which meant what?

A That the fracture line is transverse to the line of the femoral shaft, that it is generally speaking within a fair range at right angles to the line of the major bone of the

body.

Q Does that mean that the bones were not displaced, Doctor?

A Oh, no. Has nothing to do with displacement. In fact I described displacement later with respect to angulation and rotation.

Q Does it mean that type of the fracture that the bones are in fair alignment?

A No. The fact that the fractures are transverse has nothing to do with alignment. Only refers to the direction of the fracture line.

Q But in any event, by the insertion of the rod that you have described before, the bones were put in perfect alignment, were they not?

A Yes.

Q By means of that very rod, that was the purpose?

A By means of the open reduction. The doctor himself put those two bones together and joined them and fixed them with the rod. The rod didn't straighten the bones.

Q The doctor put them in line and the rod held them in place, is that correct?

A Yes.

Q That is the purpose of the rod, to hold the bones in a straight line?

A Yes.

Q So they will heal in a straight line?

A Yes.

Q And they did in fact heal in a straight line, did they not?

A They did.

Q You, during the course of the direct examination, kept referring to fragments. Were there any fragments, Doctor, in connection with this?

A I don't think I referred to fragments other than that bone fragment in the upper hip. There was no fragmentation of the fracture of the femur and there was certainly no fragmentation of the fracture of the fibula. But there was a bone fragment at the upper end of the femur or in the hip region, probably taken out at the time that they trephined the bone in the hip region.

Q I am talking now about the site where this transverse fracture took place. There were no fragments there, were there?

A As far as I can tell from my X-rays and the reading of the hospital X-rays there were no -- there was no fragmentation. Now, we call the upper section of the bone the upper fragment and the lower section of the bone the lower fragment. Again, these are the medical words which in

part or more than in part are common. The major bone being in two, has two sections. The upper is called the upper fragment and the lower is called the lower fragment. But I would not want you to believe that there was fragmentation or multiple pieces at the fracture site other than those two.

Q That is exactly the point I am making.

THE COURT: Come on, you made it, Mr.Testa. He said no. Let's get on with it. He never said anything about one fragment and that was up in the area as he described.

Q You also found an ununited upper lateral corners of the patella. What does that mean, Doctor?

A The patella is the kneecap. On X-ray there was a line where there was a zone of cartilage through one of its corners. And this is an occurrence that occurs, I think the figures are one in a hundred people. It is not very, very rare. It is of no significance. The kneecap is normal in every respect. If you would look at it and feel it and see it and examine it. But on X-ray it shows one of its growth lines.

Q I believe you said that it was conceivable that Mr. DeMauro could do other work as a longshoreman, isn't that right, Doctor?

A As I said, I didn't want to have anyone believe that I was an expert in all the jobs of a longshoreman. But

he can do bench work, he can do sitting work and there might be jobs down there of which I have no knowledge that he can do without standing on his feet all day.

Q Could he work on a dock, for example, just hooking up cargo that is being taken from the dock to be put on the ship? Just hooking it up with his hand?

A He would have to stand on his feet pretty much all day long and walk around and perhaps climb ladders. But if you mean to infer that could he stand on the docks and hook up cargo and sit down when he felt like it and not climb any ladders --

Q That is exactly what I mean. Could he do that?

A And take rest periods wherever he felt tired and in pain -- If all he had to do was stand on his feet and could rest for an hour midmorning and an hour in the afternoon, or if his knee got too tired or too painful, I think he could do that. If he didn't have to bend or lift or climb ladders or stairs.

Q You talked about quadriceps atrophy, and I believe when Mr. Shields was examining you, you indicated that that could be due just to the inactivity after an operation, isn't that right?

A No, I didn't say it quite that way. I said that there were multiple causes for it. He asked me could it be

due to the inactivity, and if I remember correctly the answer is that is one of the causes. There are several other causes for quadriceps atrophy.

Q Once you get back and resume activities, doesn't that muscle just go back to normal?

A No, it does not. Not without specific regulated therapeutic exercises, we call them. Not without very hard work to do. Just normal walking will not bring it back.

Q When you saw him on November 5, 1973, did you not recommend such exercises, did you?

A That's correct, I did not.

Q Nevertheless you now tell us that if he had embarked on such a course of exercises that the muscle would have returned to normal, is that correct?

MR. LASOFF: Objection to the form of the question, your Honor. At what time?

THE COURT: In any event it is argumentative and the jury is well aware that he said that. I don't know what you are bringing out that is new there. He did say that and he described the weights and everything else. I don't know what you are adding to this.

MR. TESTA: I have no other questions of the doctor.

REDIRECT EXAMINATION

BY MR. LASOFF:

Q Dr. Seaman, a fracture of the femur is a serious injury, is it not?

A Oh, yes, it is.

Q And to recuperate substantially from that injury requires a good deal of medical attention?

A Yes.

Q And this medical attention, besides the hollowing of a bone, should be a course, a long course of treatment by a physician or a physiotherapist and the plaintiff's work himself, is that correct?

A Yes.

Q You, yourself, spoke to the plaintiff. Are you aware that Dr. La Peluso gave Mr. DeMauro no treatment except for periodic examinations?

A I am generally aware of it, yes.

Q When you said that at the time you saw him you didn't prescribe this, was that because the time period had now elapsed and the condition was too fixed to now attempt to attain any marked improvement at that date?

MR. TESTA: If your Honor please, that is a leading question.

THE COURT: Sustained.

Q Did you have a reason for not prescribing exercises

A Yes. It was two and a half years after injury and any hope that you could get a significant improvement was almost futile.

MR. LASOFF: Thank you, Doctor.

MR. SHIELDS: No questions.

THE COURT: A person who has gout, that is a congenital ailment, is it, or is it something that you get not as a result of trauma?

THE WITNESS: It is not traumatic, but we don't think it is congenital.

THE COURT: Is that a condition that goes and comes at times and not at others?

THE WITNESS: Yes, your Honor. Very much so.

THE COURT: Once you have that, can you get cured of it?

THE WITNESS: You get cured in the sense that with long-term medication there are no symptoms in him, but not all patients, that a patient can have one attack of proven gout or two or several attacks and never get it again. It is possible. Or as I said, with medication. Or it could be that once the thing starts it gets increasingly frequent attacks and renders a patient disabled.

THE COURT: Is it bilateral or is it usually on one?

THE WITNESS: ...constantly but usually bilateral particularly in severe cases.

THE COURT: If you were told that a year previous the man had gout on the other side, it would have no relationship?

THE WITNESS: Gout is not the cause for even a minimal contribution to this, if he has it.

THE COURT: Thank you. There was some testimony on it. I just wanted to make sure that the lawyers will be able to argue about it.

MR. LASOFF: Thank you, Doctor. Will you leave your X-rays here, because they are in evidence.

THE WITNESS: I will leave the X-rays here, and take my own chart.

(Witness Excused)

MR. LASOFF: Mr. Menosky.

S T E P H E N M E N O S K Y, called as a witness by the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LASOFF:

Q Mr. Menosky, were you a member of the same gang that Betsy Delburo was on March 31, 1971?

A What is that again?

Q Were you a member of the same gang as Patsy DeMauro on the day he got hurt?

A Right.

Q Were you working on board a ship called Green Port on that day?

A Right.

Q What hatch were you working in?

A We were in number four hatch.

Q What deck level?

A Upper 'tween deck.

Q The upper or lower 'tween deck?

A I mean lower 'tween deck.

Q Had you worked on that ship the day before?

A Yes.

Q What hatch had you worked in the day before?

A We were down below.

Q We are talking about the 30th of March. The accident happened on the 31st. When you first started to work on the ship, what deck level did you start to work at?

A We were down below -- on deck. We started working on deck.

Q Did you start to work the day before on the upper 'tween deck?

A Well, we put the machine in there, the bile.

Q You worked on the ship for two days, is that correct?

A Yes.

Q And this ship was going to be discharged?

A Right.

Q When you started to work on the first day, did you discharge the cargo in the first deck down?

A Yes, I think we discharged the cars.

Q In the first deck down?

A Down.

Q Then when you finished work that day had you gotten to the lower 'tween deck level and had you put a machine down in the lower 'tween deck?

A Right.

Q On the second day that you were on work, the 31st day of March, 1971, what time did you report to work?

A We got to report eight o'clock.

Q When you report are you then taken from the place you report by bus to the pier itself?

A Right.

Q What time did you get to the pier itself?

A Oh, get there about ten after eight.

Q At that time you go on board the ship and you went to hatch number four, is that correct?

A Right.

Q Was hatch number four covered at the main deck level at that time?

A Right.

Q So that the pontoons had to be removed before you could go to work?

A Yes.

Q What time after taking off the pontoons did you men start to work in the lower 'tween deck?

A I guess takes about 8:30.

Q Were you to discharge cargo from the lower 'tween deck?

A Yes, palletized stuff.

Q Were you a witness to the accident that occurred to Pat DeMauro on that day?

A Yes.

Q What time did the accident occur?

A Well, I'd say about nine o'clock.

Q So that you men had been working in that hatch from about eight-thirty until nine o'clock, is that right?

A Right.

Q Did you actually see the accident?

A Yes.

Q Tell us what you saw.

A Well, Patsy was picking up dunnage on one side there, he was right in the center of the cargo. And I was almost on the end of the cargo, and I seen that cargo coming over, and I hollered, and it was too late. And about three cases came on top of him.

Q You are the fellow who hollered, "Look out"?

A Right.

Q You saw the cases start to topple?

A Right.

Q At the time this happened was anybody touching or near those cases?

A No, nobody was touching them.

Q Was the nearest man at that time Patsy DeMauro?

A Patsy was the nearest.

Q Was he some five or six feet away from the cases?

A Yes, about five feet.

Q At that time there was a hilo machine in the hatch, was there not?

A Yes.

Q How far away was the hilo machine at the time this accident happened?

A I'd say the hilo machine must have been about fifteen feet.

Q Did you feel any walking or swaying of the ship

at the time you saw the cases start to topple?

A No.

Q Was there any fence in front of this cargo that fell down?

A There was a fence between the jeeps there and the cargo.

Q But I am talking about in front of the cases.

A No, there was no fence.

Q There was a fence in back of the cases but not in front?

A But not in front.

Q Were these cases stowed on top of other cargo?

A There was pipe on the bottom.

Q I show you Plaintiff's Exhibit 7 in evidence and ask you if the pipes referred to in that picture are the pipes you say the cases were stowed on top of.

A Yes, the pipes show there.

Q Were these cases chocked or braced on top of the pipe in any way?

A No.

Q While you were down in that hatch from 8:30 until nine o'clock had you or any longshoreman touched the pipes or the cases?

A No.

MR. LACOFF: No further questions.

CROSS EXAMINATION

BY MR. SHIELDS:

Q Mr. Menosky, what was your job?

A What?

Q What was your job in the lower 'tween deck of number four hatch on the day of Patsy's accident?

A We were discharging the cargo, working in the hold.

Q What was your job? What were you doing?

A We were taking the dunnage away and also the hilo can get around. It is like small pieces of wood, the wheels wouldn't go over so we put it on the side.

Q What were you doing with the dunnage?

A We were throwing it on the side so the hilo wouldn't run over it.

Q Where were you carrying the dunnage to?

A We were throwing it on the side against the skin of the ship.

Q In back of these cases that fell?

A It wasn't in the way that the hilo was moving.

Q Which way from the cargo, by the empty end of the ship?

A Right, where the empty part is.

MR. SHIELDS: I have no other questions.

CROSS EXAMINATION

BY MR. TESTA:

Q Mr. Menosky, did you look at the pipe right after the accident happened, where those cases were stowed?

A You mean after Katsy got hurt?

Q Yes.

A Exactly I couldn't tell you. I was all excited, we were all excited there and all. We tried to pick the cases off him. The three cases were almost on top of him.

Q I show you Exhibit 7 and ask you if that is the way the pipe looked as you saw it after the accident.

A I couldn't tell you if it looked that way or not. It is quite awhile ago.

Q Were the cases on top of the pipe shown in that photograph?

A The cases were one on top of the other.

Q Were they on top of the pipe shown in that photograph?

A They were on top of the pipe, yes, but they were one on top of the other. They were on top of the pipe.

Q After the accident happened, is that the way the cases looked?

THE COURT: Indicating?

Q ...s shown in Plaintiff's Exhibit 7.

A This I couldn't recall because it is quite awhile ago, whether it looked that way or not. See, that is the dunnage that was taken away.

Q I show you Plaintiff's Exhibit 6 and ask you if that is the way the cases looked after the accident.

A As I say, I couldn't, I don't remember if they looked that way or not.

MR. TESTA: I have no other questions.

THE COURT: You may step down, Mr. Menosky.

(Witness Excused)

MR. LASOFF: At this time, your Honor, I ask you to take judicial notice of the life expectancy table contained in the back of the Civil Practice Law and Rules which shows that a man between the age of 47 and 48 has an average life expectancy of 25.22 years.

THE COURT: So noted.

We will take a five-minute recess. Please don't talk about the case in the meantime.

(The jury left the courtroom.)

(Recess).

(In open court - jury present)

THE COURT: The parties have been attempting to shorten the case to some degree by agreeing on certain matters.

One matter which they have agreed would probably require a witness to be here for qhite awhile before we establish this. This has to do with the expenses which were encountered by the plaintiff here. What is the agreement?

MR. LASOFF: Your Honor, it is agreed that the hospital and medical expenses in this matter amounts to the sum of $5,049.37.

THE COURT: There is another agreement which we are trying to get together on and that is in regard to the wording and placement of it, et cetera, and there are an awful lot of records here. What the lawyers suggest to the Court is that they be allowed to look at it at this time and it may not necessitate the witness having to take the stand, which will, of course, again save some time here. So I think that is a reasonable request, so we will suspend at this time and please return back at two o'clock. Don't discuss the case in the meantime. Keep your minds open. We will continue on at two o'clock.

(The jury left the courtroom.)

(Luncheon Recess)

AFTERNOON SESSION

2:00 P.M.

(In open court - jury present)

THE COURT: You recall when we last left I said to you the lawyers were going to be kind enough to look at some records. Apparently they have done that, and as I understand Mr. Testa now, he is willing since Mr. Shields and his associate went over these reports and the government man is here from whom these reports come, that he is willing that these be received in evidence provided that he put that on the record, as I understand.

MR. TESTA: No, provided the witness testifies.

THE COURT: All right, and have him come up here. This is a little b't out of order at this time because what we are trying to do is get this out of here since he is a government person and has business in his own office and there is no purpose in keeping him here.

E D W A R D H. W O L C O T T, called as a witness on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHIELDS:

THE COURT: This is not part of the plaintiff's case. They are taking it out of order just for the simple

expediency of getting this witness out of here. It actually is part of Mr. Shields' case, the ship's case, so you will keep that in mind when you listen to this.

BY MR. SHIELDS:

Q Mr. Wolcott, are you here pursuant to subpoena?

A Yes.

Q Did you bring certain records with you?

A Yes.

Q What are those records?

A They are copies of the military manifest of the S.S. Green Port, on a voyage from the Far East to various continental U. S. ports, to Bayonne, New Jersey.

Q Do you also have with you an extract of portions of those records?

A Not in this particular portion here. I just have portions of the manifest.

MR. SHIELDS: Here it is. Would you mark this for identification, please?

xxx (Defendant's Exhibit B marked for identification.)

Q Mr. Wolcott, I show you Plaintiff's Exhibit B for identification and ask you to tell us, please, what that is. Third party Plaintiff's Exhibit B.

THE COURT: You are the third party plaintiff in this aspect of it, so it is third party plaintiff's exhibit 1.

MR. SHIELDS: Your Honor wants it Defendant-Third Party Plaintiff exhibit?

THE COURT: That is it. Both designations. It is a defendant ship exhibit also produced on the part of the ship in reference to a complaint against the third party defendant.

(Third Party Plaintiff's Exhibit 1 marked for identification.)

THE COURT: He is producing this list as part of his case as a plaintiff. We have marked it both at this time. It is a defendant's exhibit and Third Party Plaintiff's Exhibit 1.

All defendant's exhibits are marked by letters and all plaintiff's exhibits by numbers. You get both.

Q Mr. Wolcott, I show you this document which is marked Third Party Plaintiff's Exhibit 1 for identification and Defendant's Exhibit B for identification and ask you, if you have seen that before.

A Yes, I have.

Q Will you tell us, please, what that is?

A This is a summary of the various loadings in the Far East and also in the Canal Zone and also in the United States. And it also summarizes particular types of cargo that were in the number five lower 'tween deck and the end of

number four lower 'tween deck that was being discharged at Bayonne.

Q Did you compare this abstract with the original records which you brought with you today?

A Yes, I have.

Q Do you find this exhibit that you have before you to be an accurate extract or abstract of your government records?

A Yes. There were a few exceptions that I took. Do you want me to initial them or anything like that?

Q If you would, please.

(Witness marks)

THE COURT: Those you initialed, I think it was three of them, don't they properly reflect what was in the cargo?

THE WITNESS: It is a clarification, your Honor.

THE COURT: You have three of them there. Why don't you explain the three of them to the jury?

THE WITNESS: Yes. You have a notation loading at Pearl Harbor or Balboa. And the typing says nothing in number four or five lower 'tween deck. When I checked the government manifest I found there was nineteen pieces of electronic equipment stowed in this particular compartment.

THE COURT: At Pearl Harbor?

THE WITNESS: At Pearl Harbor for Balboa discharge.

THE COURT: What is the next one?

THE WITNESS: The Balboa to Bayonne portion of the cargo manifest, he has number four lower 'tween deck, metal and metal products, no specification. Within the manifest they do amplify metal and metal products as steel plates, your Honor.

THE COURT: Not steel pipes?

THE WITNESS: Plates. They have number four lower 'tween deck, cars, military, and I clarified that to mean privately owned vehicles, or P.O.V.s.

THE COURT: Those are the only differences you found?

THE WITNESS: Yes, sir.

THE COURT: All the rest conforms with your record?

THE WITNESS: Yes, your Honor.

MR. SHIELDS: I offer it in evidence, your Honor.

MR. LASOFF: No objection.

MR. TESTA: May I ask one or two questions in connection with this, your Honor.

BY MR. TESTA:

Q Mr. Wolcott, do you know who prepared this list?

THE COURT: It is stipulated for the purpose of this record that Mr. Shields and his associate Mr. Tormey prepared the record. That is the representation by Mr. Shields.

MR. SHIELDS: Mr. Tormey did. I was not with him when he did.

Q What is your job again?

A I am an investigator for the office of counsel, Military Sealift Command, Atlantic.

Q An investigator?

A Or claims examiner. The actual job title is Claims Examiner.

Q These records that you have, are you in charge of those records?

A No, I am not.

Q Are they records made in the regular course of business as far as you know?

A Would you repeat that again, please?

Q Are these records made in the regular course of business, as far as you know?

A Made in the regular course of business?

Q Yes, in the regular course of the government's business.

MR. LACOFF: What records are you referring to,

the ones offered in evidence?

THE COURT: No, the ones from which he took them.

The one that you say is compiled against which you say that this is an accurate list --

THE COURT: Mr. Testa, don't amplify questions. You have a hab't of doing that. Everybody knows what he is talking about, except apparently you. He brought these records here. You want to know where did he get them. Where did you get the records?

THE WITNESS: They are in the custody of the cargo division which is in our own particular command, your Honor.

THE COURT: Are those records kept contemporaneous with the events contained thereon?

THE WITNESS: Yes, sir. These are kept in the voyage file for this particular sailing.

THE COURT: They are part of the government business as conducted?

THE WITNESS: Yes, sir.

MR. TESTA: I think in light of this witness' testimony for the record I have to object to them, your Honor.

THE COURT: Why?

MR. TESTA: Because he has indicated that he is

not the man in charge of these records --

THE COURT: Mr. Testa, you know the Federal Business Rule, don't you? He has just testified that these are records of M.T.M.T --

THE WITNESS: M.M.C., Military Sealift Command.

THE COURT: And federal government records?

THE WITNESS: Yes, sir.

THE COURT: They are official files?

THE WITNESS: Yes, sir.

THE COURT: They are kept contemporaneous with the events?

THE WITNESS: Yes, sir.

THE COURT: What more do you want under the business rule? Please tell me.

MR. TESTA: I will withdraw my objection.

THE COURT: The offer of the exhibit is received. I want this file marked for identification so that we know where they came from, but he can take the file back with him. So the clerk of the court will give that file an identification number.

(Defendant's Exhibit B and Third Party Plaintiff's Exhibit 2 deemed marked for identification.)

xxx

THE COURT: Does that have an official identification number or some designation?

THE WITNESS: They are called Ocean Cargo Manifests, your Honor.

THE COURT: But the whole file, where do you keep it?

THE WITNESS: This would be in the cargo file.

THE COURT: Does it have any designation of any kind? What does the outside of the file say?

THE WITNESS: It would say S. S.Green Port. It is listed for that particular ship.

THE COURT: All right. S. S. Green Port. No further questions. You may step down.

(Third Party Plaintiff's Exhibit 1 and Defendant's Exhibit B received in evidence.)

THE COURT: Now we are back on the plaintiff's case.

MR. LASOFF: Dr. Graubard, would you take the stand,please.

D A V I D J. G R A U B A R D, called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LASOFF:

MR. LASOFF: To meet the record, your Honor, the second Bayonne hospital admission just came to my office. May

I offer that in evidence?

THE COURT: Show it to counsel.

(Pause)

MR. SHIELDS: Defendant-Third Party Plaintiff has no objection.

MR. TESTA: No objection.

xxx (Plaintiff's Exhibit 10 was received in evidence.)

BY MR. LASOFF:

Q Dr. Graubard, are you a physician duly licensed to practice medicine in the State of New York?

A Yes, sir.

Q Do you maintain an office for the practice of your profession?

A Yes, sir. 38 East 85th Street, New York.

Q Doctor, would you give us a summary of your professional training, your experiences as a doctor, any specialties or teaching that you have done?

A I was graduated from the University and Bellevue Hospital Medical College in 1932. Licensed to practice medicine and surgery in the State of New York on June 30, 1932. Interned for one year at Beth-Israel Hospital. A second year at the Cumberland Hospital in Brooklyn; then went into the Army for three years at Governor's Island where I was assistant chief of the surgical service. From 1937 to

1941 I was in private practice, during which time I was assistant visiting surgeon at the Broad Street Hospital, Cumberland Hospital and New York Postgraduate Medical School and Hospital. From 1941 to 1946 I was in the service. From 1948 to 1955 I was assistant visiting orthopedic surgeon at the Kingston Avenue Hospital in Brooklyn, I was associate visiting surgeon at the Cumberland Hospital until 1968 and at the Grand Central Hospital until 1965. At the present time I am in private practice. I am on the surgical staff of the Trafalgar Hospital and I am classified by the Workmen's Compensation Board as a specialist in general and traumatic surgery. Traumatic surgery has to deal with injuries, and I have spent a considerable period of time from 1937 to the present time in the evaluation of individuals who have been injured. I have examined about 30,000 people to the present time.

Q Doctor, at my request did you examine Mr. DeMauro?

A Yes, sir.

Q When did that examination take place?

A That was on February 21, 1974.

Q Was that examination conducted in your office?

A In my office, yes, sir.

Q Would you tell us what your examination consisted of and what you found?

A My examination consisted of noting the way he walked, what his capabilities were of using his body, and performing various measurements with respect to his extremities. And I found that he walked with a definite limp, that he favored the right lower extremity, that there was a healed scar eight inches in length along the lateral side of the thigh, as well as a five inch curved scar about the left hip. The right buttocks shows a definite deformity. There was evidence of some laxity noted in the musculature of the buttock. His height was 5'5". He weighed 230 pounds. His eyes were blue and his hair was brown. The length of both extremities measured from the umbilicus, or the belly button, to the internal malleolus, or inside portion of the ankle was 36½ inches. I then compared both lower extremities and found the following: In the circumference of the thigh in the mid-portion I found that the right side was 20½ inches as compared to 21 inches on the left, that the circumference of the knee was fifteen inches on the right as compared to sixteen inches on the left, the circumference of the calf was seventeen inches on the right as compared to sixteen inches on the left. He could flex the thigh; in other words, with the patient lying flat on the table and bringing the thigh bone up towards his chest on the right side he could only do to a 50 degree and the left 70 degrees. The abduction or bringing the leg

out from the midline was 20 degrees on the right as compared to 25 on the left. The adduction or crossing the knees was fifteen on the right and 25 on the left. The extension of the knee or bringing the thigh backwards was 20 on the right as compared to 40 on the left. And the internal-external rotation or twisting the thigh was 60 degrees on the right as compared to 100 degrees on the left.

With regard to the knee there is a flexion of the knee, could be accomplished, in other words, bending the knee, to only 90 degrees on the right as compared to 45 degrees on the left. The extension or straightening of the knee was 180 degrees on both sides. There was an area of paresthesia or peculiar sensations or absence of sensations along what is called the lateral femoral cutaneous nerve innovation or that portion of his anterior portion or lateral side of the thigh extending from the groin to the knee almost to the midline, and almost for a whole year he could not feel sensation.

Q When Mr. DeMauro came to you, did you have any medical records?

A Yes. I had certain copies of records which I returned to your office.

Q Based on your findings did you come to a conclusion as to whether or not Mr. DeMauro had at the time you examined

him any loss of use of that right leg?

A Yes.

Q What was your conclusion?

A It was my opinion that he had a loss of 45 percent of function of the right lower extremity based upon the defects in the hip, the paresthesia, the absence of sensation, and the defect in the knee.

Q Doctor, I want you to assume that on March 31, 1971, Mr. DeMauro was working as a longshoreman on board a ship called the Green Port. It was docked on the Bayonne Military Ocean Terminal, and he was sent to work in hatch number four lower 'tween deck thereof, that about 9:00 A.M. that morning while he was bending down picking up dunnage, three or four cases fell on top of him from where they were stowed on top of pipe and that these cases each weighed 700 pounds, that he was buried by these cases and these cases had to be pried off him by four by fours, that he was taken out of the hatch on a stretcher, put on the dock, taken to the Bayonne hospital where his injury was diagnosed as a fracture of the right femur and a fracture of the upper end of the fibula, that an open reduction was performed that day and that a Kuntschner pin or nail, I think the word was, was put into the right femur.

In your opinion, Doctor, with reasonable medical

certainty was this accident the competent producing cause of these injuries?

A In my opinion, yes.

Q Was the accident the competent producing cause of the open reduction?

A Yes, sir.

Q Assume further, Doctor, that Mr. DeMauro was confined to the hospital for 24 days, that when he left the hospital he left with a walker and crutches, that he continued to use these crutches for two or three months after he left the hospital. In your opinion, Doctor, was this a reasonable period of time for him to continue to use crutches?

A Yes, sir.

Q That after he was finished with the crutches he then used a cane for an additional two or three months. Would that be reasonable medically?

A Yes, sir.

Q As a matter of fact, Doctor, would it be correct in saying that this was a rather short period of time for crutches and a cane for this type of injury?

A I'd say it is about average.

Q All right. Mr. DeMauro at the time of this accident was a longshoreman hold man. Are you familiar with the work of a hold man, Doctor?

A Yes, sir.

Q And you are also familiar with the work of a dockman?

A Yes.

Q And the work of a deckman?

A Yes, sir.

Q Did you express an opinion based on your examination as to whether or not Mr. DeMauro could perform the work of a longshoreman?

A In my opinion I did not think he was capable of doing that.

Q What type of work was he not capable of doing?

A Well, he couldn't work in the hold. And to work on deck, which is not an even type of a place to work, in which you have to be able to get about the gear, the wires, the cables, et cetera, I didn't think he was capable of doing that, because he would be walking on an uneven surface. As far as working on the dock he'd have to be able to bend to put on the hooks, et cetera, especially where the nets are concerned. He'd have to be capable of doing that, and I don't think he is capable of doing that.

Q Doctor, you just saw this man I believe a week ago.

A The 21st.

Q In your opinion, Doctor, will Mr. DeMauro's condition

remain the same, improve or get worse?

A In my opinion it is static. It is not going to get any better.

Q And it is not going to get any worse either?

A I don't think so.

Q So that he has a 45 percent loss of use of that leg?

A Yes, sir.

Q And he is incapable of doing any of the work of a longshoreman?

A That's correct.

Q When we refer to a loss of use of the leg, Doctor, of course the leg isn't missing, it is still on, is that correct?

A Yes..

Q Does that 45 percent loss of use refer to the function or working use of that leg?

A The function or working use.

Q In your examination did you find any instability in the knee?

A I did -- not in the knee. In the musculature of the buttock I found that there was instability because the muscles were gone from that particular area. He didn't have the good control. He did have a knee buckling as he

described it, but that was due in part to the nerve injury that he had and as I described.

Q So that you found him to have a nerve injury to that thigh where it was broken?

A That's right.

Q Doctor, you gave certain measurements when you testified and I noted from your measurements, going to the top of the measurements, that the right thigh was smaller than the left thigh.

A That's right.

Q That the right knee was smaller than the left knee.

A That's right.

Q But the right calf was larger than the left calf. Would you explain the significance of that, medically?

A That is due to the fact that he had this fracture about the knee, the head of the fibula, he had a cast on, and that caused a vascular or the veins and nerves to be blocked so that there is not sufficient return of flow and that causes the swelling of the calf.

THE COURT: Just a moment. Let's not go past that. There was no cast in this case, Doctor.

THE WITNESS: He had immobilization of the leg because of the fracture.

THE COURT: Is that a cast?

THE WITNESS: Not necessarily a cast, but you have immobilization.

THE COURT: I am only asking you to refine your language. You said a cast.

THE WITNESS: I'm sorry, I don't have the hospital records so I couldn't tell you.

Q I want you to assume there was a pin or nail, eighteen inch long nail in that bone and that instead of a of a cast they used -- is it a Kuntschner Nail?

A That goes inside the bone.

Q They drill inside the bone and they put this nail in?

A That's right.

Q Is that a form of immobilization?

A For the fracture, yes.

Q Does that immobilization actually work better than a cast as far as the bone fragments are concerned?

A Yes.

Q With regard to the thigh and the knee, what is the significance of the smaller measurements of the right thigh and knee?

A Well, due to the atrophy, is due to the nonuse of the muscles. He is unable to move the thigh muscles adequately

so they shrink up. Besides that, there was an operation through some of the muscles. With regard to the knee he didn't bend the knee as well so the musculature has atrophied in that particular area.

Q Did you take any X-rays, Doctor?

A No.

Q Did you feel that X-rays were necessary?

A At that time, no.

Q Did you review a recent X-ray report?

A Yes, sir.

Q Was that Dr. Seaman's X-ray report?

A Yes, sir.

Q Doctor, prior to your taking the stand today, did you see the X-rays that Dr. Seaman took?

A Yes, sir.

Q Was there anything particularly significant to you about those X-rays?

A Yes, sir.

Q What was that?

A Number one, I saw that there was calcification at the top of the thigh bone in the hip region, which shows evidence of a fracture through the calcification and there was also this large amount of callus formation still present about where the fracture site was in the thigh.

Q What effect would that have on the man's leg?

A Well, just shows that there is an overabundance of callus making the bone very solid, but with respect to the calcification on the top of the hip joint, so to say, that will be a source of pain, limitation of motion, and weakness.

Q Did you find any evidence of any cardiopulmonary symptoms?

A As far as I was concerned, he didn't show any evidence along those lines. He didn't show any evidence of any dyspnea or difficulty in breathing whatsoever?

Q This is a fairly easy symptom for a physician to discover, isn't it?

A Oh, yes.

Q You just listen to the man?

A You just listen to the man, he is panting.

MR. LASOFF: Thank you very much.

CROSS EXAMINATION

BY MR. CHIFLEY:

Q Doctor, you didn't even listen to the man, did you?

A Didn't have to.

Q So that the absence of any cardiovascular symptoms which you said could be found by listening, you never looked

for?

MR. LASOFF: Excuse me, your Honor. I think the word was cardiopulmonary.

Q I'm sorry. Cardiopulmonary.

A I watched the man walk, I watched him undress, I watched him get up on the table. He had no difficulty --

THE COURT: Wait a minute, Doctor. I think you lost sight of the question in view of the objection. I think it requires a yes or no answer.

(Question read)

A I did not look for it.

Q No, you didn't use a stethoscope on him?

A No.

Q You didn't test the blood pressure, you didn't test the heart beat?

A No.

Q Didn't take his temperature?

A No.

Q How long did your examination take, that part which you conducted?

A About a half hour.

Q Who took the measurements, you or your nurse?

A Me, myself. Each time I took them I had to go back to the paper and put down the figures.

Q What records did you have before you?

A I had some of the records concerning the type of accident he had and Dr. Seaman's --

Q An accident report from the stevedore saying that the man, that cargo fell on the man?

A I don't remember exactly that. I remember reading Dr. Seaman's report in detail.

Q Dr. Seaman is another doctor who was engaged by the plaintiff's counsel, did you know that?

A Yes, sir.

Q You don't mention any atrophy in your report, do you?

A The figures speak for themselves.

Q You mean on the measurements?

A That's right.

Q Is it unusual to find a half inch difference between the right and the left thigh?

A In a right-handed indiv'dual, yes, sir.

Q It is unusual?

A It shows that there is some pathology. Because if you are right-handed you will have a larger measurement usually in the right arm and right leg as compared to the left.

Q D'd you ever ask this man if he was right-handed

or left-handed?

A Yes, he told me he was right-handed.

Q You don't mention that in your report?

A No, sir.

Q But it is a significant finding, isn't it?

A If it was otherwise I would so indicate it.

Q But it is a significant finding if the man is right-handed and the measurements differ?

A That's right.

Q But you didn't bother to write that in your report?

A No, sir.

Q What other records did you have besides Dr. Seaman's report?

A Nothing much that I can remember, except a summary of when he got hurt and how he got hurt and the hospital he was in and what they did.

Q What was that summary, something prepared by Mr. Lasoff?

A Yes, sir.

Q Tell me, Doctor, on your direct testimony you described some damage that you found which was attributed by you to the cast that this man was wearing. Would you tell me again what that damage was?

A It was corrected to say there was no cast.

Q Yes, but you assumed there was a cast and you found damage caused by the cast. What was that damage that you found?

A Swelling of the calf due to vascular instability. In other words, due to stasis in the blood vessels.

Q And a blockage of the flow of blood?

A That's right.

Q This was caused in your opinion by a cast?

A That's right.

MR. SHIELDS: I have no other questions.

CROSS EXAMINATION

BY MR. TESTA:

Q Dr. Graubard, in stating your qualifications you said you examined about 30,000 patients since you were admitted to practice, is that right?

A Yes, sir.

Q How many of those examinations were made for the purpose of testifying in court?

A Not necessarily for testifying. I examined them, I evaluated them. If I was to go to court then it was significant. In this particular case it was for the purpose of testifying.

Q How many of those examinations did you find a

permanent disability?

A Most of them.

C Most of the 30,000?

A Yes, sir.

C In this case you found a 45 percent disability. How did you arrive at that figure, Doctor?

Based upon my experience over the years, based upon the fact that he is unable to use his hip, his knee, he has changes as far as his sensations are concerned and the stability of being able to walk adequately like anybody else.

Q Do you have any tables or books that you refer to in arriving at these percentages?

A I have used some of the books for arriving at this particular type of defect, yes, sir.

Q In this case did you refer to any books or tables in arriving at this 45 percent disability?

A No, sir.

Q You indicated you were familiar with the work of holdmen, dockmen and deckmen, is that right?

A Yes, sir.

Q A longshoreman works on a dock and all he does is hook up drafts, could Mr. DeMauro do that?

MR. LASOFF: Objection, your Honor, unless we have a representation that this is all a longshoreman on a dock

uses. I mean, this is obviously an incomplete question. Mr. Testa is representing this is all that a dockman does, but he is not an expert.

THE COURT: I will take it subject to connection.

Q Could he do that, Doctor?

A If it was just to hook up the slings, et cetera, he could do that, provided he doesn't have to bend down too far.

Q Could he operate machinery on the deck of a ship, like a winch, for example, that has levers that you pull back and forth with your hand, could he do that?

A If he is a winchman he has to be capable of bending to put out the lines. He just doesn't sit there and work on the winch. He has to be able to do other things besides that of operating the winch. If he was to just sit there and operate the winch he could do that.

Q He could do that?

A Just doing that. But if he has to do any other work with it that requires bending, I'd say no.

Q But I just asked you if he could operate the winch by pulling the levers with his arms.

A Yes, sir.

Q He could do that, couldn't he?

A Yes, sir.

Q And he could hook up the drafts on the dock, couldn't he?

A Yes, sir, if he doesn't have to do other work in the hold at times.

Q And he can walk all right, can't he?

A He can't walk on uneven surface because his knee gives away at times.

Q If the dock was even he could walk on it, is that right?

A If it is perfectly even, yes.

Q You said something before about calcification of the top of the bone in the hip region. There was no injury to the top of the bone in the hip region, was there, Doctor?

A There was, not from the original accident but it is consequential. When they put in that Kuntschner Nail part of it came up through the head of the trochanter in that area. So what you have now, in X-rays, is calcification or hardening of the soft tissues in there as a result of the irritation of this steel bar.

Q That is not part of the ball and socket hip arrangement, is it?

A No. But with the muscles it has to do with.

Q So that we haven't affected the ball and socket hip arrangement in any way as a result of this accident, have we, Doctor?

A No.

Q As far as this atrophy is concerned, that was only a half inch when you examined him?

A I didn't hear that.

Q I say the atrophy, the difference, is only a half inch?

A That's right.

Q If he exercised would that return to the same as the other leg?

A I don't think he can because he has got this limitation of motion with the muscles that prevents him from adequately moving it. And besides that, it is now almost three years since the accident and at this time any type of physical therapy to increase the motion would be valueless.

Q How about normal walking exercise? Would that be valueless, too?

A Normal walking?

Q Yes.

A No, that is good. Walking is good exercise.

Q And that he could do?

A To a limited extent.

MR. TESTA: I have no further questions.

REDIRECT EXAMINATION

BY MR. LASOFF:

Q Doctor, referring to your first paragraph of your report which is called "History," can you read that for a moment, to yourself, not to anybody else.

(Pause)

A Yes, sir.

Q At the time of your examination of Mr. DeMauro, were you aware that he had had an open reduction and a steel nail in the leg and that the nail was later removed?

A Yes, sir.

Q As a matter of fact, that deformity of the buttock that you talked about, was that where the nail was taken out?

A Yes, sir.

Q Doctor, when you examine a patient for the purpose of physical evaluation as to permanency of a member, do you make him go through certain physical motions?

A Yes, sir.

Q Did you do that in this case?

A Yes, sir.

Q Would you tell us what you had Mr. DeMauro do while you were examining him?

A First I asked him to move his leg in a certain

manner voluntarily. And then passively I tried to increase the movement with my own hand to see what angle it took, and then measured it. So that there are two measurements that were then noted, and this is what it came out to be, as I indicated.

Q No, I am referring to the evaluations. Does he have to get up and down the table?

A Yes.

Q And other physical movements?

A Yes. He walked, he was stripped and he walked across the floor and I watched the way he walked.

Q Cardiopulmonary symptoms serious enough to disable a man, would that be a wheeze or a gasp?

A It would be a shortness of breath and in this particular instance where he was lying flat on the table he would be unable to breathe if he had any cardiopulmonary difficulties because he would say I have shortness of breath, I can't lie flat. He would have shortness of breath when I asked him to do the maneuvers I asked him to do.

Did he show any of these symptoms?

A No.

MR. LAKOFF: Thank you.

BY THE COURT:

Q When you say 45 percent disability you don't

mean to convey to the jury that the man is 45 percent disabled, do you?

A No, just the member.

Q Just the leg?

A Yes.

Q As a whole person do you have any idea of that?

A [illegible] the whole person, about eight percent of the body as a whole.

Q Let me ask you, I'm not saying this is so, and I am only inviting the jury to make their own appraisal of this, but it seems that what you say is the trouble with this man now originates in the hip because of the calcification of the portion of it through where the nail was driven.

A As far as the hip, yes, sir.

Q Suppose Dr. Seaman said that wouldn't bother him much and if he only had that he could do the work, would that change your opinion?

A He'd still have trouble with the knee.

Q I am saying, as I understand Dr. Seaman's testimony, the man's trouble here was what he calls quadriceps muscles, the four quadriceps muscles, and that was the source of his trouble and actually the others as far as he was concerned didn't bother him.

A The quadriceps are those muscles that go in the

front of the thigh towards the kneecap.

Q What I am suggesting to you is, you say it is up in the hip and the buttocks.

A He has some disability in that area. I don't say that it all comes from the hip. It also involves the knee and the muscle of the thigh.

I understood you to say that what was really causing him the pain and the suffering was this callus or gout up in this area where the nail was.

A No, that was just part of his entire disability.

THE COURT: All right.

MR. LASOFF: May I ask one question?

BY MR. LASOFF:

Q As a matter of fact, at the time you made your examination, you had never seen that callus formation in the leg, you first saw those X-rays in court today, is that correct?

A That's correct.

MR. LASOFF: Thank you.

THE COURT: You are excused.

(Witness Excused)

MR. LASOFF: May I ask for a stipulation from ship's counsel, your Honor, that the ship had the plaintiff examined by a Dr. Murray Burton on November 20, 1973.

MR. SHIELDS: Yes, your Honor, and he is not

available to testify.

MR. LASOFF: If your Honor please, I didn't ask whether he is available. Mr. Shields is not the man to say he is not available.

THE COURT: I don't know. At this point he is saying yes to your stipulation and then as part of his case if this man is unavailable he has a right to show that he is.

MR. LASOFF: Yes, your Honor, but not as part of my case.

THE COURT: No.

MR. LASOFF: May we also have a stipulation that Dr. Burton is an orthopedic surgeon?

MR. SHIELDS: I believe he is, your Honor, but --

THE COURT: Can you represent that?

MR. LASOFF: I can't represent it, your Honor.

THE COURT: All right. Then you both believe that he is but you don't know.

MR. SHIELDS: I can't say for certain.

THE COURT: All right. There is one thing I'd like to talk to you about. You are going to rest, I assume.

MR. LASOFF: Yes.

THE COURT: Before you rest, will you come up a minute?

el/lf

(At the side bar)

THE COURT: You have been referring all along to these X-rays weighing 700 pounds. I have heard not one scintilla of evidence as to what they weigh or anything else about them. I don't claim that this is a big deal but if you are going to keep doing it I'd like to find out what you base that on. What is the basis for that?

MR. LASOFF: Didn't some of the witnesses say what they were?

THE COURT: None of the witnesses said anything about the weight of these cases that I am aware of. You have said it in opening and all along here and you are assuming it is so. There should be something in the record or otherwise, a stipulation as to what the weight of the cases is.

MR. TESTA: We don't know.

MR. LASOFF: All the men who told me, I didn't think to ask them.

THE COURT: If you want to recall the plaintiff, he can describe it.

MR. LASOFF: How is he going to know the weight of a crate that falls on him. Do we have a cargo manifest that knows what these crates are?

MR. SHIELDS: I have a cargo manifest, but you

couldn't pick it out. We have tried.

MR. LASOFF: The jury will just have to assume when they decide the case.

THE COURT: All right. But I just wanted to point out, there is no evidence in the case except as you have indicated, that you are assuming it was 700 pounds. While you are here, you were going to rest?

MR. LASOFF: Yes.

THE COURT: Where is the notice of the negligence?

MR. LASOFF: The ship arrived this way, on the discharge. They created the condition if there was any condition. I don't have to show notice. This is the way the ship arrived in port. Any condition they created or permitted to exist before the ship came here.

THE COURT: You are relying on constructive notice?

MR. LASOFF: Correct.

THE COURT: And the fact that they themselves handled the material?

MR. LASOFF: Right.

THE COURT: I'm not too satisfied on the negligence part of it but you are moving to dismiss on both grounds, are you?

MR. SHIELDS: Yes.

THE COURT: I will reserve decision on the negligence, I will deny it on the seaworthiness.

MR. LASOFF: I am going to make a motion for directed verdict at the end of their case, your Honor. It may be premature now, but I will make that motion.

THE COURT: At this time we have nothing from Mr. Testa.

MR. TESTA: The ship has to go first.

THE COURT: So you have nothing at this point?

MR. TESTA: No.

MR. SHIELDS: This creates a problem. Captain Wheeler was supposed to be here. I don't know where he is.

THE COURT: We will take a five-minute recess to show where he is.

MR. SHIELDS: Absent that I have nothing but a few pages of the cross examination of the captain's --

THE COURT: We will put in as much as we can then.

MR. LASOFF: I thought you were having the doctor.

MR. SHIELDS: No, tomorrow morning.

THE COURT: We will put in whatever you have and we will see where we are by that time.

(In open court - jury present)

THE COURT: We have concluded the plaintiff's case and now the case moves to Mr. Shields. He is going to

present evidence, and there is some difficulty with it which is who was supposed to be here. We hope that he does appear in short order. If he doesn't we will have to take some action and we may have to adjourn, unfortunately, at this time.

MR. SHIELDS: Your Honor, at this time I offer into evidence a commander's abstract of voyage which was identified by the captain on his deposition.

MR. TESTA: Where is this identified in the deposition?

MR. SHIELDS: You have a copy, Mr. Testa.

MR. TESTA: May I suggest that you read the deposition, and when you come to that point, you offer it.

THE COURT: Do you have more than one copy of this deposition?

MR. SHIELDS: I only have the one copy, your Honor.

MR. LASOFF: I think I have an extra one, your Honor.

THE COURT: Then let your associate get up here and the jury will get a better picture of what is going on because when they hear the two different stories they will realize one is the witness and the other is the lawyer. He will take the place of the man who gave the deposition so it will

appear as if he was in court. Don't forget, this is all taken under oath, it is evidence like everything else that is evidence in the case.

MR. SHIELDS: Will your Honor tell the jury that this is the cross examination, a continuation of the deposition that Mr. Lasoff read yesterday?

THE COURT: If you remember, I explained to you at that time that this is evidence. This is part of the same record except he is reading now the questions that he asked at that time. What you heard the other time were questions that Mr. Lasoff asked.

MR. LASOFF: May it show for the record that this witness was produced by Mr. Shields, that it is his witness?

THE COURT: Yes. Each side has a right to examine anybody at all they think knows anything about the case.

MR. SHIELDS: The examination was conducted pursuant to a notice of deposition served upon the defendant-third party plaintiff by counsel for the third party defendant. The examination was actually conducted by Mr. Tormey. Maybe we ought to change places. We will leave it this way.

THE COURT: I think it is confusing enough now.

BY MR. SHIELDS:

"Q Mr. Gonzalez, how long have you had a master's? Do you have a master's license?

"A Yes, sir.

"Q How long have you had a master's license? What was the first issue?

"A About 1948, somewhere around that time.

"Q Have you been employed aboard merchant ships in the capacity of a master or chief mate since that time?

"A Yes, sir.

"Q How long have you been employed aboard merchant ships generally?'

"A Oh, about 30 years.

"Q What was the nature of your first employment on board merchant ships?

"A As a seaman.

"Q Did you, yourself, did you work yourself up through the ranks to position of master?

"A Yes, sir.

"Q I call your attention to March 31, 1971. I believe you testified that an accident occurred to Mr. Pasquale DeMauro which was reported to you at that time at approximately 9:10 A.M.

"A Yes, sir.

"Q Who reported that accident to you?

"A The third mate, Mr. Harrison.

"Q What did you do then?

"A The first thing was to try to get the man ashore as soon as possible, which the longshoremen had already started.

"Q After the man was put ashore, what did you do then?

"A I went down the hatch and tried to find out exactly what happened.

"Q Were you directed to any particular hatch by anyone?

"A To the number four hatch.

"Q Who directed you to the hatch?

"A The third mate, I believe, indicated that the accident happened in number four.

"Q Did you proceed down to the number four hatch?

"A Yes, sir.

"Q Were discharge operations taking place in the lower 'tween deck of the number four and number five hatch at that time?

"A When I went down into the hatch?

"Q Yes.

"A I believe they had already started.

"Q Did anyone point out to you the area where

"this accident had taken place?

"A I talked to some of the longshoremen working there. I inquired where the accident happened and they indicated it was in the lower 'tween deck in the port side.

"Q Of number four hatch?

"A Number four hatch.

"Q I am going to show you a copy of the cargo stowage plan which indicates commenced loading March 1, 1971, completed loading March 3, 1971, which includes, of course, the schematic of the decks, below decks of the vessel. I will show you this document and ask you to indicate where on there the accident area was indicated to you.

"A Approximately the after end of number four.

"Q Could you put an X there, please?

"A Yes, sir.

"Q Was there other cargo in the area, the lower 'tween deck of number four hatch at the time you went to the area?

"A There was general cargo in pipes."

Your Honor, before we proceed, the document referred to is marked as Defendant-Third Party Plaintiff Exhibit A for identification on the deposition and I would now

offer it in evidence, although it is not of any great significance.

MR. TESTA: I would assume that somewhere in the deposition it was identified and at that point it should be offered in evidence, if I may suggest it.

BY MR. SHIELDS:

"Q Was there any other cargo in that area, the lower 'tween deck of number four hatchat the time you entered the area?

"A There was general cargo and pipes.

"Q Was there any other cargo around that you noticed?

"A I do not remember.

"Q Is the lower 'tween deck below hatches number four and five on the Green Port a continuous deck?

"A Yes, sir."

I will offer it in evidence, your Honor, simply so that the record will be complete.

MR. LASOFF: No objection.

MR. TESTA: No objection.

THE COURT: All right. It will be the next exhibit in our case.

(Third-party Plaintiff's Exhibit 3 received in evidence which is the same as Defendant's Exhibit D.)

BY MR. SHIELDS:

"Q I believe you testified that on March 30, 1971, stevedores commenced discharging hatch numbers four and five, is that correct?

"A Yes, sir.

"Q What is the usual procedure when stevedores commence a discharge operation such as was being performed at Bayonne?

"A Do you mean in what order they would discharge the hatches?

"Q No, I am talking about when they are first going to start discharging a particular hatch, is there any procedure that is gone through? Who was the first one to enter the hatch?

"A I could not tell you that, but they all go in at the same time.

"Q Are you referring to employees of the stevedoring entity?

"A Yes, sir, the longshoremen. They open up that hatch and go down there and their boss tells them what he wants them to do.".

MR. TESTA: If your Honor please, I have an objection to the next two questions.

THE COURT: Do you want to read those or do you want

to go by them?

MR. SHIELDS: I'd like to read them.

THE COURT: I will rule on it.

(At the side bar)

MR. SHIELDS: Your Honor, I will withdraw that one and read the next one. But that probably will create the same.

MR. TESTA: I am objecting to the next two questions, your Honor.

MR. LASCOFF: This is where he is objecting from.

MR. TESTA: I am objecting to the question on line eight.

MR. SHIELDS: I am withdrawing that one and going down to line 20.

THE COURT: The objection is sustained to the question which appears on page 35 on line 20. What is the next one you have?

MR. TESTA: The next one is on page 35, line nine.

THE COURT: It doesn't really answer the question. It says they should have but it doesn't say they did.

MR. TESTA: That is my objection.

THE COURT: That is sustained also, question nine on page 36.

MR. TESTA: And I am objecting to question on line

twelve and on line nineteen.

MR. SHIELDS: I don't see any objection to it.

THE COURT: I overrule the objection because that only sets up that he wasn't, that nothing was said to him. That doesn't mean to say that anything wasn't said to anybody else. It is only what he, himself, knows. Nobody said anything to him. I will withdraw that.

MR. TESTA: Then on line nineteen.

THE COURT: That is the same thing. "Were you informed?" Same ruling, with an exception to the third party defendant.

(In open court - jury present)

MR. SHIELDS: Proceeding to the question which is on line twelve, page 36:

"Q On March 30th, were you informed by any personnel of the stevedoring entity which was discharging cargo from the Green Port that they had any objection to the cargo, to the way the cargo was situated in number four and number five hatch on any deck?

"A No, sir.

"Q Were you informed by any personnel of the stevedoring entity that they had any objection to the cargo, the way the cargo was stored in the lower 'tween deck of number four or number five hatch, on March 31, 1971?

"A No, sir.

"Q Mr. Gonzalez, I am going to show you a document which is a compilation of the cargo manifest of the Military Sealift Command relating to the loading operations for the loading done aboard the Green Port between Pearl Harbor and Bayonne, New Jersey. I show this document to you and ask you, does this document indicate what cargo was loaded into number four, five hatch, lower 'tween deck during those ports during the voyage of the vessel from Honolulu to Bayonne?"

This, your Honor, is the document which has been marked Defendant's Exhibit B-Third Party Plaintiff's Exhibit 1 in evidence.

"A Are you referring to cargo loaded for --

"Q Bayonne.

"A Bayonne?

"Q Right.

"A Yes, sir. You have a list there of cargo loaded at Oakland for Bayonne.

"Q Let's take it in sequence. Is there any indication of cargo loaded at Honolulu for Bayonne?

"A No, sir."

MR. LASOFF: Your Honor, may I point out for the record that that is one of the corrections that the Army made, that there were nineteen cases of electrical equipment

loaded in Honolulu, for Bayonne.

THE COURT: Yes, that is my recollection of it. Of course, the jury will recall what the witness said. There is no doubt about that, is there?

MR. SHIELDS: Mr. Lasoff is right. It is Pearl Harbor here, but that is Honolulu.

"Q Let's take it in sequence. Is there any indication of cargo loaded in Honolulu for Bayonne?"

The answer was, "No, sir," but Mr. Wolcott made a correction which indicates that nineteen pieces of electronic equipment were loaded at Pearl Harbor for discharge at Balboa.

THE COURT: Will you read the answer on line 24, skipping the others because of the correction made by Mr. Wolcott.

BY MR. SHIELDS:

"A The next load after the Hawaiian port was Oakland.

"Q I refer you to the document which is marked" --

MR. SHIELDS: May I change it, your Honor, to indicate the marking here rather than the identification marking on the deposition?

THE COURT: Give that marking that is on the case

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now.

BY MR. SHIELDS:

"Q I refer you to the document which is Defendant's Exhibit B and Third Party Plaintiff's Exhibit 1 and ask you was this cargo loaded in Oakland for Bayonne on the Green Port on the lower 'tween deck of number four and five hatches?

"A Yes, sir.

"Q I ask you specifically, were there motor vehicles loaded in Oakland for Bayonne in the lower 'tween deck of number four or number five hatch?

"A The number four lower 'tween deck, vehicles, tractors, road construction.

"Q What about number five hatch lower 'tween deck?

"A You have a ditto mark under number five lower 'tween deck, so I take it that cargo was loaded, the vehicles, tractors and road construction equipment was loaded in four and five lower 'tween decks.

"Q Were there any other motor vehicles?

"A Yes, sir, number four lower 'tween deck, two automobiles listed.

"Q What was the other cargo listed besides motor vehicles in the lower 'tween deck of number four and number

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five hatch?

"A Electronic equipment, hand tools, tires, bearings, clothing, vehicle parts, electric lamps, stationery, paints.

"Q Could you categorize the rest of the cargo?

"A As general cargo.

"Q Were there any steel pipes or anything of that general description loaded at Oakland on number four or five hatch on the Green Port?

"A Specifically it doesn't mention pipe. It mentioned metal or metal products."

MR. SHIELDS: Your Honor, before proceeding with this question I ask that this document be marked for identification.

(Third Party Defendant's Exhibit 4-Defendant's Exhibit E marked for identification.)

xxx

BY MR. SHIELDS:

"Q Let's move on to the next port. Would you look at Defendant's Exhibit E-Third Party Plaintiff's Exhibit 4 and see what the next port after Oakland was?

"A Balboa.

"Q I refer to Defendant's Exhibit B and Third Party Plaintiff's Exhibit 1 and again ask you: was any cargo loaded in the lower 'tween deck of number four or five

hatch at Balboa?

"A Yes, sir.

"Q Would you tell us what cargo was loaded into the lower 'tween deck of number four hatch at Balboa?

"A Household goods, metal or metal products, no specifications. Cars, military and vehicles boxed.

"Q Is that everything?

"A Yes, that is everything.

"Q Was there anything in lower 'tween deck number five at Balboa?

"A Not according to this list.

"Q What was the next port after Balboa?

"A The next port was Charleston.

"Q Was any cargo loaded in the lower 'tween deck of number four or number five hatch at Charleston?

"A No, sir.

"Q What was the next port after Charleston?

"A Norfolk, Virginia.

"Q Was any cargo loaded in the lower 'tween deck of number four and five at Norfolk, Virginia?

"A No, sir.

"Q What was the next port after Norfolk?

"A Bayonne, New Jersey.

"Q Were any loading operations taking place

"In Bayonne?

"A No, sir.

"Q Only discharge operations?

"A As far as I can recall, only discharge operations.

"Q Was this the end of the voyage, in Bayonne, of this particular voyage?

"A Yes, sir.

"Q I will refer you to the deck log again, which has been identified" --

MR. SHIELDS: Which is in evidence as Defendant's Exhibit A.

"Q I will refer you again to the deck log, Defendant's Exhibit A, for the entries relating to loading or discharging operations in Oakland. Does the deck log indicate whether loading operations were performed in the lower 'tween deck of number four or five hatch at Oakland?

"A On the 9th of March, 1971, at 1400 two gangs of stevedores went aboard to rig up number two and four hatches. At 2115 hours first draft discharge on number four upper 'tween deck. That is the only mention I see here of number four right now.

"Q How long was the vessel you are talking about discharging for number four or was it loading into

"number four lower 'tween deck?

"A The 10th of March at 1130. Start the loading number two lower hold and number four lower 'tween deck."

MR. LASOFF: That should be steel, I think.

BY MR. SHIELDS:

"Q Do you see any indication for loading at the lower 'tween deck of number five hatch?

"A Will you repeat your question again, please?

"Q Was there loading in the lower 'tween deck of number five hatch at Oakland?

"A On the 10th of March, is that what you want to know?

"Q At any time while the vessel was in Oakland.

"A I don't know how long it was there. You want to know in number five, right?

"Q Yes.

"A No, sir, the log book does not show any loading of number five here.

"Q Does it show any loading on the previous date or any other day that it was in Oakland?

"A No, the log does not indicate they loaded

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"cargo in number five lower 'tween deck.

"Q I will ask you if motor vehicles are loaded into the lower 'tween deck of any of the hatches, including number four or number five hatch, would it be customary for the motor vehicles to be stored in the hatch square?

"A Yes, sir.

"Q Would it be customary for any other general cargo to be stowed in the wings of the deck?

"A It could be stowed in the wings.

Q If there was general cargo or other type of cargo stowed in the wings and motor vehicles stored in the square, would it be customary for there to be some type of chocking or cargo fencing between the general cargo and the motor vehicles in the square?

"A Yes."

MR. TESTA: If your Honor please, I am going to object to testimony as to what would be customary and usual, unless it refers to this particular voyage.

THE COURT: There is testimony in this case already. Under the circumstances I will sustain the objection. But the witness who was on that side of the hold testified that he uld chock these vehicles up, you recall. Pratt, I think his name is.

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MR. TESTA: I am just objecting --

THE COURT: All right. I sustained the objection.

BY MR. CHIELLO:

"Q When loading operations were complete in Oakland, was the area, the lower 'tween deck of number four and/or number five hatches inspected?

"A Yes, sir.

"Q Is there any indication that carpenters were aboard?

"A Yes, sir.

"Q Does it indicate what the carpenters were doing aboard? Were they on board after the vehicles left and had completed loading?

"A Yes, sir, they were aboard after the stevedores left.

"Q What does the deck log indicate regarding the carpenters?

"A On the 11th we had two gangs of stevedores at work at 800 securing cargo number two, loading and securing cargo on number four, plus one gang of carpenters shoring cargo. They opened up at twelve noon. At one o'clock had two gangs of stevedores and one carpenter gang shoring, loading and building catwalk. At 1310 cargo finished loading. At 1510 all the cargo lashed and had shores and all stevedores knocked off and carpenters continued building catwalk."

MR. TESTA: If your Honor please, I have an objection to this question. May we be heard on it?

THE COURT: Come up.

(At the side bar)

MR. TESTA: The question on line twelve, page 44.

THE COURT: I think that argument has to be made, but I don't think it is a good question. You can argue from the testimony already in that he was satisfied; otherwise, he would have said something about it. I will sustain the objection; however, he can argue the point when he talks to the jury.

MR. TESTA: But you are sustaining the objection.

THE COURT: Yes.

(In open court - jury present)

MR. SHIELDS: Turn to page 45, please. Line 12.

"Q What part of number four were the carpenters working at?

"A On the previous day, the 10th of March, at 1130 started loading steel -- I beg your pardon -- starting loading number two lower hold, household goods and number four, lower 'tween deck, steel. At 1530, that is on the 10th, loading three hatches on deck, cargo and carpenters securing cargo.

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"Q Would you continue?

"A At 1850 deck gang day longshoremen knocked off and continuing shoring by the carpenters. Finally, according to the log book here, the carpenters shoring as necessary that night. They knocked off at 2400. That was on the 10th. On the 11th we had one carpenter gang shoring, lashing and catwalk. The catwalks on deck.

"MR. LASOFF: On deck?

"THE WITNESS: The catwalks on deck, but the shoring, lashing cargo all over the ship.

"MR. LASOFF: The carpenters are lashing cargo?

"THE WITNESS: It depends on the port.

"MR. LASOFF: In Oakland the carpenters lash cargo?

"THE WITNESS: I couldn't tell you. It depends on the port. Some ports they do, some ports they don't. In some ports the longshoremen do their own carpenter work.

"Q Had the lower 'tween deck of number four and/or five hatch been inspected by the ship's personnel after loading operations were commenced in the lower 'tween deck on these hatches?

"A In Oakland?

"Q Yes.

"A Would you repeat the question?

"Q Was the lower 'tween deck of number four

"and/or number five hatch inspected by any of the ship's personnel in Oakland after the loading operations had been completed?"

MR. LASOFF: We both object to this answer as not responsive to the question.

MR. TESTA: May we get a ruling on that?

THE COURT: Let me see it.

(Pause)

THE COURT: Actually he doesn't answer the question until down to line 25 where he reads an entry from the log, apparently.

MR. TESTA: If your Honor please, that is the answer that I am objecting to and also the next page there is a series of questions and answers starting at line nine.

MR. SHIELDS: Your Honor, I will withdraw that. It is in evidence in the log book.

THE COURT: That is the point. He never answered the question on his own knowledge.

MR. SHIELDS: He is really referring to the log book and the log book is in evidence and any of the parties or anyone in the case can read it.

MR. SHIELDS: Page 48, line nine.

MR. TESTA: That question I am also objecting to,

your Honor. I just indicated I had an objection to a question on page 48, lines nine and fourteen. It is the same situation.

THE COURT: Let me see it.

(Pause)

THE COURT: These are entries in the log. It seems to me you can read them right from the log. He is only reporting what was in the log.

MR. SHIELDS: Your Honor, I will skip several pages.

THE COURT: All right.

MR. SHIELDS: On page 51, line seven.

"Q When you moved to the next port, which was Charleston, I believe on March 26th, does the deck log indicate that any cargo was loaded or discharged from the lower 'tween deck of number four or number five hatches in Charleston?

"A No, sir.

"Q Norfolk, Virginia, is the next port and I believe that is March 28th. Does the deck log indicate any cargo was loaded or discharged in the lower 'tween deck of number four or five at Norfolk?

"A Not on number four."

MR. SHIELDS: The rest of it is almost exclusively reading from the deck log which is in evidence. So I shall cease.

THE COURT: All right. Did your witness appear?

MR. SHIELDS: No, he did not.

MR. LASOFF: May we have a recess while they call him, your Honor?

THE COURT: All right. We will take a five-minute recess. Don't discuss the case in the meantime.

(The jury left the courtroom)

(Recess)

(In open court - jury present)

THE COURT: The parties advised the Court that they have run out of witnesses and under the circumstances there isn't much we can do except adjourn at this time. We will, therefore, reconvene tomorrow at ten o'clock. Please don't discuss the case among yourselves or with anyone else nor form or express an opinion in this matter until it is submitted to you for your decision. You are excused at this time and as I indicated before report in the jury room tomorrow morning at ten o'clock.

(The jury left the courtroom)

(3:45 P.M.)

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PATRICK DE MAURO

vs.

CENTRAL GULF SS CORP.

72 Civ. 636

vs.

INTERNATIONAL TERMINAL OPERATING CO.

February 27, 1974
10:15 A.M.

(In open court - jury present)

MR. LASOFF: Your Honor, before Mr. Shields puts Dr. Andriola on the stand, Mr. DeMauro has brought in the pin, the nail. I offer it in evidence.

THE COURT: Any objection?

MR. SHIELDS: No objection.

MR. TESTA: Can we be heard at the side bar with respect to that?

(At the side bar)

MR. TESTA: If your Honor please, I think this is highly inflammatory.

THE COURT: It is.

MR. TESTA: The jury has heard all the testimony.

THE COURT: They have also seen it now. How am I going to erase that from their mind? Do you move for a mistrial?

MR. TESTA: I would, yes.

THE COURT: Motion denied. The objection is overruled. It is received over objection.

(In open court - jury present)

(Plaintiff's Exhibit 15 was received in evidence.)

MR. SHIELDS: Dr. Andriola, would you take the stand, please.

J O S E P H C. A N D R I O L A, called as a witness by the Defendant, having been first duly sworn, was examined and testified as follows:

THE COURT: Will the lawyers step up a minute, please?

(At the side bar)

THE COURT: This doctor is a classmate of mine from Fordham. The last time I saw him was eight years ago. Before that I hadn't seen him for 30 years. I have no social relationship with him and I don't know him any more than you do at this point.

MR. LASOFF: I have no objection to his testimony.

MR. TESTA: I have no objection.

THE COURT: In view of the fact that there are certain objections allowable under certain circumstances, I bring it to your attention.

MR. LASOFF: No problem.

MR. TESTA: No objection.

(In open court - jury present)

DIRECT EXAMINATION

BY MR. SHIELDS:

Q Doctor, are you a physician duly licensed to practice medicine in the State of New York?

A I am.

Would you please state for the jury your experience and qualifications in the field of medicine?

A I am a qualified general surgeon in medicine and I am a fellow of the American College of Surgeons. I am licensed to practice medicine in the State of New York.

Q What hospitals have you been associated with and what hospitals are you associated with now?

A I was associated with Harlem City Hospital and Lutheran Hospital in Manhattan and Wadsworth Hospital and Columbus Hospital. I have now restricted myself only to Columbus Hospital.

Q Doctor, are you here pursuant to subpoena?

A Yes, sir.

Q Served by my office?

A Yes, sir.

Q Did you examine the plaintiff Mr. Pasquale DeMauro on May 1, 1972?

I did, sir.

Q Did you examine him at the request of Central Gulf Steamship Corporation?

A No, sir.

Q At whose request did you examine him?

A At the request of I.T.O.

Q What was the purpose of the examination?

A It was a consultant examination, nonpartial in type.

Q Did you examine Mr. DeMauro?

A I did, sir.

Q Would you describe, please, your examination?

A Just the examination?

Q First, did you take a history from the man?

A I did, sir.

Q What history did Mr. DeMauro relate to you?

MR. LASOFF: If your Honor please --

THE COURT: Sustained. He is not the treating doctor. There is a rule of law and we abide by it, it is actually New York law, that says if a doctor does not treat a patient there is no reason for him to know the history because he is not treating him and, therefore, it is not of relevance as far as he is concerned, since he is only a doctor who was brought in to examine him and see what the extent of his injuries were at that time. He is not a treating doctor.

But you were given a history, weren't you?

THE WITNESS: I was, sir.

THE COURT: All right.

Q Did Mr. D'Mauro state any complaints to you?

A His complaints, his chief complaints were he tires easily when standing for any length of time. When trying to lift or bend he strains his right thigh causing severe pain in the right thigh and the right knee.

Q Did you then conduct an examination?

A The physical examination revealed a 44 year old Caucasian male weighing 235½ pounds, 5'5" in height, walks with a limp and complains of a slight pain in the right thigh. Inspection of this area revealed an 8½ inch scar on the lateral aspect and above the right hip joint there was a 5½ inch scar. There is no atrophy of the musculature of the right thigh when compared to the left thigh. There is no shortening of the right lower extremity when measured from the right anterior iliac spine to the right medial malleolus. The same measurement being --

THE COURT: Wait a minute. When you go past terms like that, which the jury would not know -- what is the malleolus?

THE WITNESS: The malleolus is the ankle bone, the two little humps on each side of the ankle. And we usually

measure with a tape measure from what I call the superior iliac spine, which is another point on the hip on the same side, you measure from that point to the malleolus to the inner aspect of the ankle. And those are the points used for comparative measurements of the length of the legs. And they were both equal. There was no limitation of motion on flexion and extension of the right thigh or on flexion of the right leg at the knee joint. On straight leg raising of the right leg and thigh minimal pain was obtained at the right hip joint. Inspection of the upper end of the right fibula by palpation revealed no abnormality.

THE COURT: What is palpation?

THE WITNESS: Palpation is touching. By touching the various parts with your hand, you feel, try to find out if a part is warm or abnormal in anatomical position, or if it excites pain.

Q Doctor, what were your conclusions based upon your examination?

A Without X-rays my conclusions were clinically, one, fracture of the midshaft of the right femur, healed; two, fracture of the upper end of the right fibula, healed; and both injuries were causally related to the accident of 3/31/71.

Q Did you find any present disability at the time

of your examination on May 1, 1972?

A No, the present disability, in my opinion, was not causally related to the accident of 3/31/71, but due to the patient's extreme obesity, which was producing cardio-pulmonary symptoms. It was recommended that the patient lose at least 80 pounds.

Q Did you find any atrophy, Doctor, on your examination of the quadriceps muscle?

A No, sir.

Q And did you find any instability in Mr. DeMauro's knee?

A Which knee, the right knee?

Q The right knee.

A No, sir, I did not.

Q And did you check for those two things?

A I did, sir.

Q And it is your conclusion that if any disability existed on May 1, 1972, that it was not related to the accident of March 31, 1971, but rather to the patient's extreme obesity and cardiopulmonary symptoms, is that correct?

A Yes, sir.

MR. SHIELDS: Thank you, Doctor.

CROSS EXAMINATION

BY MR. [illegible]:

Q Dr. Andriola, at the time of this examination, May 1, 1972, were you a physician on the panel of I.T.O. to examine and treat longshoremen who were injured in navigable waters of the United States while in their employ?

A I was not on the panel to treat any longshoremen. I was just a consultant for examinations. I did not treat patients on the pier or had nothing to do with the treatment of patients. They were referred to me at random.

Q When you made this examination, Doctor, were you furnished any reports by I.T.O. in connection with this examination?

A Yes, I did. They are not always complete, but --

May I see what you were given at the time of your examination?

THE COURT: Mark it for identification.

A That is my report. It is back of the report there.

MR. LASOFF: May I separate this, your Honor.

THE COURT: Yes, separate it and give him back his report. Just mark what was given to him by I.T.O.

xxx (Plaintiff's Exhibit 16 marked for identification.)

THE COURT: You already have a copy of it, don't you?

MR. LASOFF: Yes, I do, your Honor.

THE COURT: All right.

Q Am I correct, then, that you received one form report from Dr. LaPeluso and one narrative report from Dr. LaPeluso?

A I only received -- pardon me. Will you repeat the question for me, please?

Q One form report, a form that contains information, and one narrative report, where the treatment and disability are outlined.

A One report. The form report was not by Dr. LaPeluso. It was by Sidney Chanes, who then referred the case to LaPeluso, it says on that report. And then I have a second report, but this one is the one from Dr. LaPeluso.

Q Fine. Did you, yourself, take these measurements that are referred to in your report?

A Yes, sir.

Q Did you just testify that you found Mr. DeMauro to be 5'5"?

A Yes, sir.

Q Doesn't your report say 5'2"?

A It was a typographical error. It is 5-5.

Q It was 5-5 and not 5-2?

A Right.

Q How did you recognize that this was a typographical

error? So you have any records here that show you that this is a typographical error?

A I have my record here.

Q That is a copy of this report here?

A It was corrected by my secretary.

Q That report was corrected by your secretary. Well, would you say that a man of 5-5 should lose 80 pounds or 60 pounds, Doctor?

A Yes, sir.

Q 80 or 60?

A 80.

Q So that a man of 5-5 of Mr. DeMauro's build should only weigh, in your opinion, approximately 155 pounds?

A Yes, sir.

Q And work as a longshoreman?

A Yes, sir.

THE COURT: Can we establish whether he weighed 230 at that time because I didn't hear him say anything about his weight. In your report, is there anything about the weight?

THE WITNESS: On my scale it was 235½ pounds.

MR. LACOFF: He has testified that he weighs 230 now and did before the accident.

THE COURT: I didn't hear the doctor say how much he weighed when he examined him back in May of 1972 and at that

time he was 235½ pounds?

MR. LASOFF: Yes, sir.

THE COURT: All right.

Q You, yourself, took no X-rays with regard to Mr. DeMauro, did you not?

A No, sir.

Q In order to determine whether a fracture is healed, isn't it necessary to take X-rays?

A Yes, sir.

Q Why didn't you take X-rays, Doctor?

A The length of time and having been discharged by a qualified orthopedist who took care of him and who recommended that he return to work, his own orthopedist from Bayonne hospital, who discharged him, I must conclude by rational thinking that the leg, the fracture was healed.

Q That was your conclusion based on rational treatment but not on medical evidence?

A Also on my clinical observation, use of my hands and my powers of observation, I came to that conclusion also.

Q Did you ever see Dr. La Peluso's X-rays or X-rays of the Bayonne hospital?

A No, sir.

MR. LASOFF: Are the X-rays up here now?

(Handing)

MR. LASOFF: May we have a shadow box, please?

(Pause)

Q Doctor, I ask that you first look at these X-rays, all of them by yourself to familiarize yourself with them, and then if you would, point out any abnormalities that you see in those X-rays, to the jury.

(Pause)

THE COURT: There is a number on each one. As you describe them, tell us what number it is.

THE WITNESS: May I ask a question, the date of these X-rays, sir?

Q The dates of these X-rays, I believe, November 5, 1973.

A Thank you.

(Pause)

A I am through examining, sir.

Q Do you see any abnormalities in those X-rays, Doctor?

A Yes, sir.

Q Would you show the jury what they were, or are?

THE COURT: What is the purpose of this, Mr. Lasoff? There isn't anybody that denies there were fractures. There isn't anybody that denies there is callus tissue there. Even

this doctor says it is a healed fracture.

MR. LASOFF: The doctor also said there was no limitation of motion and I want to establish from him that from the nature of the abnormalities of these X-rays there would have to be limitation of motion.

A Here we have a fracture of the right femur, which is the mid --

THE COURT: Remember, I told you to give me the number first.

A Exhibit number 11, Plaintiff's Exhibit 11. An X-ray taken on 11/5/73 of the right femur. The R stands for the right femur, shows an X-ray of the femur which apparently had a fracture and is well healed now and has a wonderful callus binding that will eventually re-absorb, and which appears as a deformity which actually is a support, will disappear with time. If you were to re-X-ray this man every five or six months, you will see that this abnormality will disappear, as this line here heals completely across. He has a good result here.

THE COURT: Getting to Mr. Lasoff's question, is there anything on that X-ray which would indicate to you anything other than what you have testified to so far?

THE WITNESS: No, sir.

THE COURT: Put specific questions to him.

Q Doctor, I asked you was there anything abnormal and I ask you that you limit your answer to anything that you see abnormal in any of those X-rays. And if you would, look at the X-ray at the upper end of the femur.

A I did look at the upper end of the femur. There is nothing abnormal, sir.

Q Isn't there a fragment of bone or calcium sticking up right over here at the upper end of the femur, on this X-ray?

A But it has nothing to do with the femur per se. It is not separated from the femur. It has nothing to do with this femur, the neck of the femur or the tuberous of the femur. This may be calcification within the muscle itself. I don't know, I have not treated this patient. I am only telling you that as far as the femur is concerned it has no abnormality there.

Q Doctor, it is a fact, is it not, that a pin or nail was put in Mr. DeMauro's right femur?

A Yes, sir.

Q I show you this. Would this be the type of nail?

A Yes, sir.

THE COURT: Indicating --

Indicating Plaintiff's Exhibit 15 in evidence.

In order to put this nail in the man's leg, don't you have to drill through the femur bone?

A You actually do not drill through the bone. These nails are measured, this nail is placed within the canal of the bone. The canal of the bone would be -- in other words, when Dr. La Peluso cut his leg here, to expose this fracture, which was broken, he brought one fragment out and he tested his nail, if it would fit that diameter. They come in various sizes, various gauges. And if it didn't fit too well, he used a reamer, not a drill, a reamer just to ream the canal of the bone marrow.

Q Did he have to use a hammer as well?

A Yes, sir. First he takes out this here piece, tests the diameter, nails that nail through this upper fragment, lets it come out through the hip, makes a little cut there, and then lines it up and hits it out from the inside and holds the fragments firm.

Q The fragment that you were just looking at which you say is in the muscles above the femur, the muscle of the hip, either calcification or bone fragment, wouldn't that be a competent producing cause of pain, Doctor?

A Not necessarily. There are many people walking around with that type of a, what they call a myositis ossificans. It may be a muscle itself that becomes ossified in their elbows,

especially the tennis players. Some may experience pain, some may not.

Q Would it be a competent producing cause of pain?

A It may and it may not.

If Mr. DeMauro says he has pain there and you see that fragment there, in this case would it be a competent producing cause of pain?

A I didn't see the fragment, I didn't feel the fragment at the time and I cannot make a decision on it. I didn't examine for it.

THE COURT: He is asking you to assume that there is such a fragment there, could it be a competent producing cause of pain?

THE WITNESS: As I say, it may, sir. It may or may not. I said that.

Q If you had taken X-rays you would have seen the fragment there, correct?

A If I had taken X-rays I would have seen the fragment.

Q Doctor, it is a fact, is it not, that according to your report Mr. DeMauro attempted to return to work on April 27, 1972.

A Correct.

Q And he found that he was unable to perform any

duties because he was unable to bend and lift?

A He returned to work on 4/27/72 but was unable to perform any heavy duties because he found it difficult to bend and lift.

Q And further in your report, he says when trying to lift or bend he strains his right thigh causing severe pain in right thigh and knee, is that correct, Doctor?

A He strained his right thigh causing severe pain in the right thigh and knee, correct.

Q Doctor, what are cardiopulmonary symptoms?

A Cardiopulmonary symptoms are shortness of breath, is one of the common symptoms, clinically.

Q Wheezing?

A Wheezing is another symptom.

Q Anywhere in this report of yours, Doctor, this two-page report, do you mention any shortness of breath or wheezing?

A I mention just cardiopulmonary symptoms that I observed without mentioning wheezing.

Q Did you mention shortness of breath, Doctor?

A I did not mention it, but I observed it.

Q You observed it but you didn't mention it?

A As he was dressing, undressing.

Q Did Dr. La Peluso ever mention any shortness of breath or cardiopulmonary symptoms?

A I have no reports of Dr. La Peluso mentioning such..

Q You have none from him?

A No.

Q You said something about Dr. La Peluso being Mr. DeMauro's own orthopedist, is that correct, Doctor? Or to be an orthopedist from I.T.O?

A Dr. La Peluso is according to the report here, is to be -- I don't know him, he is from Jersey; Bayonne, Jersey. When the patient was admitted to Bayonne hospital according to the first report it appears that the examining physician referred this man to the orthopedist of the hospital. I don't know, sir.

Q Correct. And his examining physician was Dr. Sidney Shanes, who is also an I.T.O. physician, isn't that correct?

A I don't know, sir. I don't know any of the physicians working for I.T.O.

Q In Jersey?

A In Jersey.

Q You do know Dr. Tagliagamle in New York?

A Yes, sir, I do.

Q You found no limitation of motion on flexion and extension of the right thigh or on flexion of the right leg

at the knee joint, is that correct?

A Right.

Q Did you find any limitation of motion any place --

A No, sir --

Q -- with regard to either the thigh, the knee or the leg?

A No, sir.

Q If I told you, Doctor, that Dr. Mario Tagliagambe examined this patient on behalf of I.T.O. in November of 1973 and did find limitation of motion, would you change your opinion?

MR. SHIELDS: Your Honor, I object to this.

THE COURT: Sustained. I don't think it calls for this type of testimony. This is in effect asking one witness to characterize the testimony of another.

Q If you refer to your report, this patient was discharged by Dr. LaPelusa on April 7, 1972, on the first page, as having received maximum benefit from therapy, is that correct?

A Yes, sir.

Q Do you know what therapy Dr. DeMauro received?

THE COURT: Are you going to use this box any more, Mr. Lanoff?

MR. LANOFF: No, your Honor.

THE COURT: Then can we get it out, because it is very unsteady and I am sure it is going to fall at some point in time.

(Pause)

A According to the history I received from the patient --

Q No, I am asking you, do you know what Dr. La Pelusa did, not the history you received from anybody.

A Dr. La Pelusa probably observed this man and he probably told him to continue to do quadriceps exercises, which was the most important thing he should do. Anybody who has a fracture of the femur, if he is able to walk the way he is walking now. That's all that Dr. La Pelusa could do. There was probably no physiotherapy here. That was from my own --

MR. LASOFF: Move to strike the answer, your Honor.

THE COURT: Yes. You lost track of the question. Do you know from your report what kind of physiotherapy he gave?

THE WITNESS: No, I do not know.

Q If I were to tell you that the testimony by Mr. Delgure is that he did nothing, would that concur with your treatment as a surgeon?

A Yes, sir.

Q You wouldn't give the man any treatment after the operation either, is that correct?

A If it is this particular type of fracture, the same type of injury, this man doesn't require any physiotherapy.

Q Does he require exercises with weights under the trained hands of a physiotherapist?

A No, sir.

Q In other words, you put the pin in, you take the pin out and that's all there is, nature heals itself?

THE COURT: That isn't what he said. You asked his answer to be stricken, but in his answer he didn't say that. He said he is supposed to do exercises. But you had it stricken out, so I agreed with you, at that point in time it made no sense. But if you want him to repeat his answer --

Q Should Dr. La Pelusa have prescribed a series of exercises for Mr. DeMauro to do?

A He should have, if he is treating this type of a fracture.

Q Do you know if he did?

A I don't.

Q Would you agree that proper medical procedure would be to prescribe these exercises?

A I want a definition of the word "prescribe," sir.

THE COURT: What he wants to know is: If this case comes into your office and you are treating a man, would you ordinarily say to him, look, take these exercises and do them at intervals that I give you?

THE WITNESS: If this were my man he'd be told from the day that the pin was put in the hospital within a few days to begin to perform quadriceps exercises, which consists of extending the leg as many times as you can, from the time of operation. If this were my case that I did personally, this would be my prescription for the patient, within the hospital.

Q Would you prescribe just lifting the leg or when the leg is strong enough, lifting it under weights, Doctor?

A I don't believe in that form of therapy. My form of therapy consists only of active motion which will bring muscle back to its normal conditions.

THE COURT: You are aware, are you, that some doctors do prescribe weights gradually increasing?

THE WITNESS: Yes.

THE COURT: But you don't follow it?

THE WITNESS: I don't prescribe it.

Q At the time of your examination what type of work

was Mr. DeMauro capable of doing?

A I felt that he could return to his duties as a longshoreman.

Q What type of duties as a longshoreman?

A I don't know what type of work they do, sir. All I know is they have a title of longshoreman.

Q You know that there are different classifications of longshoremen, do you not?

A Yes, but I don't know any of them.

Q You don't know what a holdman does?

A I know a holdman does anything that is within the hold.

Q Do you know that a holdman has to go down ladders approximately 60 feet high?

A Probably. I don't know definitely.

Q And you felt that Mr. DeMauro can go up and down ladders 60 feet in height with this leg?

A At the time of my examination I felt that he could do anything that pertained to a longshoreman's duties, whether he worked in a hold or on a car or anything. From the physical viewpoint he could do labor.

Q Were you furnished with a report of a Dr. Michaels, Doctor, another doctor for I.T.O.?

A No, sir. These are the only two reports I was

given.

Q Doctor, did you ever look at the Bayonne hospital record?

A No, sir, I don't have it and I have never seen it.

Q I show you the record for both admissions, and I presume you are familiar with how records are kept there, and I am asking you now a very specific question, Doctor. Please limit your answer to this question: was there any sign of any cardiopulmonary symptoms in either of those hospital records?

(Pause)

A Do you know if the operative report is in this chart?

Q This is the chart that was subpoenaed, that's all I know about it, Doctor. I don't know any more about it than you do. If you are interested, he was given a general anesthetic, if that is what you are referring to.

A No, I was looking for his blood pressure.

THE COURT: What about medication? Is there any digitalis or anything else like that?

THE WITNESS: No. The only finding here, it is a matter of interpretation, is the chest film. A supine chest film, taken in lordotic position. The cardiac silhouette

appears enlarged. This may be position. The lungs show no active infiltration, there is no pleural fluid, the bony structures are intact. Impression, no active disease, referring to lung disease.

And pulmonary refers to lungs, is that right, Doctor?

A Yes. But the cardiac silhouette appears a little enlarged.

Q It says may be according to position?

A Yes. I am looking for blood pressure. The blood pressures, even though the electrocardiogram doesn't show anything, the blood pressure seems to be high during the operation, around 80. Whether that is the enlarged heart or not, I don't know. But from clinical observation --

THE COURT: No, limit it.

Q We are just talking about what's in the hospital record, Doctor.

A That's all I have today.

Q If a person is confined to bed for 24 days in a hospital, if you are going to have any cardiopulmonary symptoms, they are going to show there, is that correct, Doctor?

A Repeat the question, please.

Q If a man is confined to a hospital to a bed for 24 days, if he has any cardiopulmonary symptoms they will

become aggravated by lying in bed, is that right?

A No, they will get better by lying in bed, sir. That is why we put him to bed.

Q If a man had cardiopulmonary symptoms, would it require special anesthesia, Doctor?

A Not necessarily.

Q Would you use a spinal in preference to a general?

A There are various determining factors by the anesthetist who is giving the anesthesia, and according to his experience, he may substitute any one that he feels, and depending on his examination and the medical man's examination.

Q Is there any indication in the hospital record of any medicines given for any cardiopulmonary symptoms?

A I didn't go through the trouble of looking for them. Do you want me to go through the chart again, sir?

Q I asked you to look at the whole record, Doctor.

A If you want me to go through the record --

Q I will show you the medication sheets, Doctor.

(Pause)

THE COURT: Suppose we take a five-minute recess while the doctor is looking at it.

(The jury left the courtroom)

(Recess)

(In the courtroom in the presence of the jury.)

Doctor, did you remember the question?

THE COURT: Do any of the drugs indicate anything to do with --

A There is only one drug here which was given, which was prescribed, on 4/13/71. The drug is Aldactazide, one tablet now and then after breakfast. Apparently this drug is used as a diuretic in pulmonary conditions, fluid on the chest. I went for his notes to see what was noted for that day for prescribing that drug, but the notes are poorly written. I went through the nurses' notes and you don't have the complete, all of the nurses' notes completed for that date. But this is on the physician's orders, Aldactazide. And it was given on the medication sheet that this drug was given, because that is the order, and then they have a nurses' sheet here where it shows that this drug was given. And this drug is indicative, it is used most commonly in pulmonary, cardiopulmonary disease to eliminate fluid.

Q Chest X-rays were taken which revealed that there was no fluid, is that correct?

A The chest X-rays were taken at the time of operation or admission, or before surgery. This may have appeared as a clinical symptom picked up by the doctor at the bedside and he ordered the drug.

Q It is also quite common when someone is confined to bed to develop respiratory ailments in a hospital, such as pneumonia. Confinement to bed is not the healthiest thing for a patient.

A That is common when a person is in a ward. Cross infection, such as when it is cold. But there is no mention of it here.

Q Right. And except for that, there is no mention of it in the entire hospital record, is that right, Doctor?

A Right.

MR. LASOFF: No further questions.

MR. TESTA: I have no questions.

THE COURT: Thank you. You are excused.

(Witness Excused)

MR. SHIELDS: Captain Wheeler.

WILLIAM WHEELER, called as a witness on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHIELDS:

Q Would you state your present employment and your experience and background, please?

A Yes, sir. I am presently employed as a marine surveyor, marine consultant prior to the Port of New York. My

maritime experience start[illegible] 193[illegible] when I started to sea as an ordinary seaman. I [illegible] enrolled in the cadet training program, Maritime Commission, in 1938. I was graduated from that course of training with a third officer license. I sailed as third officer about a year and a half. I sailed as -- passed the examination as second officer for about a year. Likewise through chief officer, about a year and a half, and then in 1945 I passed the examination as master of American flag vessels. I sailed as master through 1948, when I reverted back to chief mate. '50, '51 I was called to active duty with the Navy, in Korea. In '52 I came back to merchant shipping as chief mate. At the end of '52 worked ashore as a stevedoring superintendent. In 1955 I went back to sea again briefly for a period of six months as master. When I came back from that voyage I came into my present activity as a marine surveyor.

MR. SHIELDS: Your Honor, at this time I would ask the Court to take judicial notice of the safety and health regulations for longshoring which at that time were contained in 29 Code of Federal Regulations, part 1918, et seq, and which are now found in 29 C.F.R., part 1918.

MR. TEUTE: If your Honor please, I would object to any testimony with respect to these regulations as being purely within the province of the Court in connection with the Court's charge to the jury.

THE COURT: I didn't hear a word about any testimony. He simply indicated to the Court that he wanted me to take judicial notice of it, and I do take judicial notice of it.

MR. TESTA: All right. I would object to any testimony other than that.

THE COURT: I have nothing to rule on. There is absolutely nothing, no question before anybody, nor has anything been said except to take judicial notice of it, and I do.

Q Captain, are you familiar with the safety and health regulations for longshoring?

A Yes, I am.

Q You have not been here during any of this testimony, have you?

A No.

Q I will, therefore, have to put questions to you using certain assumptions hypothetically based on testimony which has been given. But before we do that --

THE COURT: You said you want me to take judicial notice of some regulations, right?

MR. SHIELDS: Yes.

THE COURT: Do you think it would be nice if the jury would know what we are talking about and read them so we know what they are?

MR. SHIELDS: May I read the specific ones, your Honor.

MR. TESTA: That is specifically what I am objecting to.

THE COURT: That is specifically what I am allowing over your objection. I'm not going to have this jury wonder about what these rules and regulations are and then find out when I charge them what they are. I want them to listen now so that when they hear the testimony we can determine whether or not they have been complied with and whether there is a necessity for compliance.

MR. TESTA: I want to make an objection to the record, your Honor, that this is properly in the province of the charge by the Court.

THE COURT: I thank you for it, and I know it, and if there is an objection, I overrule the objection.

MR. SHIELDS: Your Honor, I will first read part 1918.83A, which reads:

"When necessary, cargo shall be secured or blocked to prevent its shifting or falling."

Part B, or rather subsection B of the same part reads:

"In breaking down, precaution shall be taken when necessary to prevent the remaining cargo from falling."

In part 1918.2, subdivision A, the regulations provide that the responsibility for compliance with the regulations for this part is placed upon employers, and the --

MR. TESTA: If your Honor please, may we also have the next part of that section read?

THE COURT: Yes, you can read any part of it you want. But let him read his and you can read yours.

MR. SHIELDS: Part 1918.3, subdivision A, which contains definitions, reads:

"The term 'shall' indicates provisions which are mandatory."

THE COURT: In reading this, and when we took judicial notice of it, there are certain terms used, Captain. For example, what does it mean, "cargo shall be secured"? What does secured mean?

THE WITNESS: Secured means that the cargo shall be prevented from moving in response to the motions of the ship when the ship is at sea. The ship is rolling and pitching. The cargo has to be secured in some manner.

THE COURT: And then it goes on to say, "or blocked. What does blocked mean?

THE WITNESS: Blocked means it can be blocked or supported laterally, sideways, by other cargos. And if it is

blocked completely from the side of the ship all the way across to the other side of the ship, then that cargo would be described as having been blocked out, it's been filled up, that space is filled up.

THE COURT: There is an expression in the next section which says, "In breaking down." What does that mean?

THE WITNESS: Breaking down is part of the discharging process where the ship comes into port with the cargo piled up. The longshoreman's job is to approach that pile of cargo and remove it piece by piece. And as they are breaking it down they have to be careful of the other cargo that they have now removed, the material that had been supporting it, they have to take steps to see that that cargo is stable.

Captain, the Green Port, assume that the Green Port was on a voyage from the Pacific Ocean, Pearl Harbor, to Oakland, California, to Balboa, Panama Canal Zone, to Charleston, South Carolina, to Norfolk, Virginia, and to Bayonne, New Jersey. Assume also that after leaving the port of Balboa, Canal Zone, there was absolutely no activity of any sort either loading or discharging in the lower 'tween deck of number four hatch, assume further that during the course of that voyage from Balboa. Captain, I show you Defendant's Exhibit A in evidence, which is the log book of the Green Port covering

the time from the Port of Honolulu on March 9, 1971, until its arrival at Bayonne, New Jersey, on March 29, 1971. Captain, will you examine that log with particular reference to the wind and weather and seas that the vessel encountered during that voyage?

THE COURT: We have already answered that. Do you know the ship?

THE WITNESS: In general, the fact that it is a C-4, Maritime Commission C-4 type dry-cargo freight ship. I don't recall having been aboard this ship, but I have been aboard C-4s.

THE COURT: All right.

Q Captain, examine it, and if you will -- start at Oakland. Never mind Honolulu. I mean, start at Balboa.

THE COURT: By the way, do you want to afford the doctor the courtesy of letting him come on first, or do you want to wait?

MR. SHIELDS: I think I would like to put the doctor on.

THE COURT: Do you want to do that, Mr. Lasoff?

MR. LASOFF: No, sir.

THE COURT: Then you don't want to have the doctor --

MR. LASOFF: No, sir. I said I don't mind.

THE COURT: I didn't think so. In the meantime, Captain, you can look those over.

(Witness steps down)

(House)

MR. SHIELDS: Thank you, your Honor. Dr. Tagliagambe, take the stand, please.

M A R I O F. T A G L I A G A M B E, called as a witness on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHIELDS:

Q Are you a physician duly licensed to practice in the State of New York?

A I am.

Q Would you please state for the jury your background, your association, your qualifications?

A I graduated from Columbia University, New York Medical College, interned at the Cumberland Hospital of the State of New York, was resident in traumatic surgery at New York Postgraduate Medical School and Hospital. Served in the Armed Forces in the Second World War as a medical officer at various general hospitals on orthopedic staffs. Since then I have been in the practice of traumatic surgery in the State of New York. At the present time I am on the

Attending staff of the Columbus Hospital, that is on the traumatic and orthopedic staff. On the orthopedic staff of the Flower-Fifth Avenue and Metropolitan Hospital Center. Assistant clinical professor of orthopedic surgery at New York Medical College, fellow of the American Fracture Association and a member of the International College of Surgeons.

Q Is your practice generally restricted to the orthopedic field and the traumatic surgical field?

A Traumatic surgery, yes, sir.

Q Did you have occasion to examine a Mr. Pasquale DeMauro?

A I did, sir.

Q When did you conduct that examination?

A That examination was conducted on 11/20/73.

Q What did your examination consist of?

A It consisted of taking a history, examination of the area that had been injured in this case, and an evaluation of same and X-ray studies that were ordered by me and reviewed.

Q Did the patient or did Mr. DeMauro state any complaints at the time of the examination?

A He did, sir.

Q Will you please tell us what your examination

disclosed?

A Examination of the right lower extremity, which is the area that had been injured, he had hurt his femur, revealed the following: On inspection it was noted that the patient was markedly obese, he was 5'5" tall, weighed 230 pounds. Measurements of the right and left lower extremities at various levels, namely the thighs, knees, and legs, revealed no atrophy by virtue of actual measurement. On the right thigh, nineteen inches. Left thigh at the same level was nineteen inches. The right knee was 16½ inches; left, 16½. The calves, 16-3/4 on the right; 16-3/4 on the left.

Q Would those be normal measurements for a man who is 5'5" weighing 230 pounds?

A Yes, sir. There was an eight inch longitudinal scar, this was an operative scar, in the right midthigh, lateral aspect. There was a 5¼ inch slightly eliptical scar in the posterior lateral aspect of the right upper thigh region.

Q That is up around here (indicating)?

A Yes. There was no shortening of the lower extremity by virtue of measurements. They were 32¼ inches bilaterally. No deformity, no swelling was noted, no discoloration. On palpation --

Q What is palpation, doctor?

A That is actually feeling the area. Touching and

feeling the whole extremity. There were no areas of local heat, no areas of point tenderness were noted, no muscle spasm.

Q What areas did you examine by palpation?

A Both lower extremities, sir. The right lower extremity being the injured part. The left lower extremity was used for comparative purposes. On motions there was mild restriction of internal rotation and external rotation of the hip. Alleged difficulty in coming up from a squatting position. Neurological examination, knee and ankle jerks were physiological. No pathological reflections were elicited. Sensation was intact. The femoral, popliteal, posterior tibial and dorsalis pedis arteries were of normal pulsation and volume.

Q Are those all arteries in the leg?

A In the lower extremity, sir, from the groin down.

Q Everything was normal on your examination?

A As far as the circulation goes, yes, sir.

Q Insofar as circulation?

A That's correct, sir.

Q And as far as the neurological examination was concerned, were the findings normal?

A These were normal, sir.

Q You did take X-rays?

A I referred the patient for X-rays, sir.

Q What was indicated in the X-rays?

A Well, the X-rays were taken for two reasons, sir. Number one, to note the degree of healing, bone healing, bony union --

MR. LASOFF: I object to the answer. The only question is what was indicated on the X-rays.

THE COURT: Yes, but you could realize that if you were questioning, what would you do, go back and ask him, wouldn't you?

MR. LASOFF: I'd like a foundation.

THE COURT: All right, sustained.

Q What was the purpose of the X-rays?

A The purpose of the X-rays were to note two things. Number one was the degree of bony union and number two, to evaluate the alignment or the position of the bone. For that purpose I referred him for X-rays to a radiologist.

Q What were the indications shown on the X-rays?

MR. LASOFF: Your Honor, is this information contained in this report, or some extraneous source? He's been reading from a report here. I want to know if he is going beyond the report or is it in the report.

THE COURT: You have the report.

MR. LASOFF: There is nothing in the report about X-rays at all.

THE COURT: Are you relying on your report or is this from memory?

THE WITNESS: From memory. I reviewed this prior to coming here.

THE COURT: I also have a report of these X-rays, your Honor, in my records. When I examined him naturally I didn't have the X-rays and my report was based on my examination. I referred him for X-rays. When those were taken they were returned to me with a report and the X-rays. On the X-rays, the bony union was good. There was firm bony union and alignment of the bone was excellent.

Q Based upon the examination conducted by you and the X-ray reports, do you have an opinion as to the man's condition on November 23, 1973?

A I do, sir.

Q What is your opinion?

A It was my opinion, that number one, he was able to perform his regular work; number two, that he attained maximum benefit of medical treatment; number three, that he would have a permanent defect of the left lower extremity or what we refer to as a scheduled defect not in excess of ten percent of the right leg.

Q You found the man on your examination approximately four months ago, fit, in your opinion, to return to work as a

longshoreman?

A That's correct, sir.

Q Are you familiar with the general duties of longshoremen?

A I am, sir.

MR. SHIELDS: Thank you very much.

CROSS EXAMINATION

BY MR. LAKOFF:

Q Doctor, may I have your X-ray report?

A Surely. (Handing)

Q Incidentally, did you bring the X-rays here today, Doctor?

A No, sir. I don't have those, sir.

Q Dr. Brancaccio took these X-rays?

A Yes, sir.

Q He is the radiologist that you customarily send patients to for X-rays when you need them, correct?

A He is one of them, sir, yes, sir.

Q You, yourself, take X-rays in your office, do you not?

A I do.

Q In this instance you sent him out to a radiologist to take X-rays?

A That's correct, sir.

Q Were there any abnormalities in these X-rays, Doctor?

A May I have the report, sir, and I will be able to answer it more accurately and descriptively.

Q This is the only copy you have, Doctor?

THE WITNESS: Yes, sir. I have the other copy in my Bay Ridge office and I didn't have a chance to pick it up.

Q I refer you to osteoporotic changes in the femur.

A There is a mild degree of skeletal osteoporosis to the right hip joint structures.

Q What is osteoporosis, Doctor?

A Osteoporosis refers to the demineralization of bone. When a bone is not used in the normal pattern, many times it will develop a little weakening of the mineral structures. And there was a little mild degree of osteoporosis in this case from the fact that he hadn't used this extremity over a period of time in the normal pattern.

Q Were there any other abnormalities on those X-rays, Doctor?

A I don't believe, sir. Mild hypertrophic changes were noted in the lumbar vertebrae, which we aren't concerned with here. But insofar as the bony structure, I don't see

any abnormality. There was some calcification noted around the fracture site, but that is a sequelae of the fracture itself.

Q Was there calcification or bone knitted around the upper end of the femur?

A Upper end? There was an area of calcification two centimeters in the region of the greater trochanter.

Q Would that calcification come from the area where the pin, the Kuntschner Nail was inserted in the leg?

A That's correct, sir. That is probably what it was secondary to.

Q Would that be in the musculature, rather than the femur itself, that calcification?

A I would say it is between the muscles and the bone itself.

Q May I have the report, Doctor, since it is the only one?

A Sure.

(Handing)

Q Doctor, you examined this man on behalf of International Terminal Operating Company, Inc.

A That's correct, sir.

Q This was November 20, 1973?

A That's correct, sir.

Q At the time you wrote this report you had not yet received this X-ray report, is that correct?

A When I dictated the report I hadn't received the actual report but I had spoken to the doctor, I believe I had spoken to him verbally. This report was based on my clinical findings and not on the X-ray.

Q So that the X-rays as a matter of fact were not considered in determining the permanency that you found this man to be suffering, correct?

A Permanency is based on clinical examination, not on X-rays.

Q Fine. Doctor, you were brought here today by Mr. Shields for the Central Gulf Insurance Company, is that correct -- Central Gulf Steamship Company.

MR. SHIELDS: Your Honor -- I will let him answer.

A I am here pursuant to subpoena. I met the gentleman for the first time today.

MR. TESTA: Can we approach the Bench on this?

THE COURT: Where is the subpoena? Who subpoenaed you?

MR. TESTA: That is not the point I want to approach the Bench on.

THE COURT: Wait a minute.

(Pause)

THE COURT: Mr. Shields' office's subpoena. You want to put something on the record?

MR. TESTA: Yes, sir.

(At the side bar)

THE COURT: I don't know whether it slipped or not, but you have insurance company. Do you move for a mistrial?

MR. TESTA: Absolutely. That is the basis for the motion, your Honor.

THE COURT: Denied.

MR. TESTA: I'd like the record to show that that is the basis of the motion.

THE COURT: Of course that is the basis of the motion. He mentioned the word "insurance."

MR. TESTA: Yes.

(In open court - jury present)

Q Since November of 1972 have you been a consultant for International Terminal Operating Company?

A Not 1972, 1973.

Q When in 1973?

A I guess as of November 1st.

Q Prior to that were you a treating physician on the panel of International Terminal Operating Company?

A I was, sir.

Q In connection with that, did you maintain offices at pier 40, New York, at 110 President Street in Brooklyn, and another office at 39th Street and Third Avenue in Brooklyn?

A I did, sir.

Q Are those offices still open?

A Yes, sir.

Q You examined this man not as a treating physician but as a consultant, is that correct?

A That's correct, sir.

Q You, yourself, found evidence, clinical evidence of restriction of motion, is that correct?

A That's correct, sir.

Q And that motion was a restriction of the internal rotation and external rotation, correct?

A That's correct, sir.

Q In addition to that, you found that he had difficulty in coming up from a squatting position?

A He alleged that.

Q If a man had either calcification or bone in the area that is described in Dr. Brancaccio's X-ray report, would that be a competent producing cause of pain?

A I don't believe so. Not in that area.

Q That is the area between the femur and the musculature of the hip bone?

A That's correct, sir.

Q Would that not hamper or restrict to some degree the motion of the hip?

A If it did play a role in the restrictions that I noted, it may be a factor.

Q And if it did play a role in the restrictions you noted, wouldn't it also be a cause of pain?

A No, sir.

Q Doctor, when you examined the patient as a consultant, you also take note generally of his entire body structure, did you not?

A We get a general evaluation, yes, sir.

Q You noted his weight and his height and that he was markedly obese?

A That's correct, sir.

Q And I presume you would also note the way that he breathes?

A If it is a factor in my evaluation, I would. My evaluation was restricted to the orthopedic and traumatic evaluation of an extremity.

Q Did you find any indication of any cardiopulmonary symptoms?

A I did not evaluate him for that, sir.

Q In examining the man, did you find any symptoms

that indicated to you cardiopulmonary trouble?

A I have no independent recollection of same and I wasn't particularly involved or concerned with that.

Q You knew that the man hadn't gone back to work yet, didn't you, Doctor?

A That is part of the history.

Q If he had cardiopulmonary symptoms and you felt this was a cause of his not working, you would have recorded that, wouldn't you?

A If I were evaluating him for that, yes.

Q Part of your job as a consultant is to evaluate whether the man has some other condition that prevents him from working, isn't it, Doctor?

A Not particularly, no. I am asked to evaluate an area that was injured. I did that. If he has other medical problems it obviously would require more than just one examination of this type to evaluate, and this was not what I was asked to do in this case. I was asked to evaluate the effects and results of an injury that he had sustained during the course of his work.

Q Doctor, when you make this examination, the man has to perform certain motions, squatting, bending, standing on one leg?

A That's correct, sir.

Q And in the course of these exercises is it not a fact that anyone with cardiopulmonary symptoms will wheeze or his breathing hiss, and it will be very audible to you?

A If that was the case, sir, I would have noted that.

Q That was not the case, was it, Doctor?

A No, sir.

Q Thank you.

A During the course of my examination, that is.

Q Did you ever hear of such a thing as a confidential report, Doctor?

A Yes, sir.

Q Did you make a confidential report to International Terminal Operating Company in this case?

A No, sir.

Q Is it not a fact, Doctor, that you made a confidential report in which the person's alleged loss of use was five times as great as that in your report?

A Absolutely not.

MR. LASOFF: No further questions.

THE COURT: Mr. Lasoff, do you have any basis in fact for that question?

MR. LASOFF: May I approach the Bench, your Honor?

THE COURT: I'd like you to produce it now if you

have it.

MR. LASOFF: Yes, your Honor.

THE COURT: Then you are going to produce it as part of your case, is that right?

MR. LASOFF: I can't, because it is not part of my file. It is the stevedore's file. May I tell you at the Bench?

THE COURT: Yes.

(At the side bar)

MR. LASOFF: In going through medical bills, your Honor, there is a slip of paper on top of the files saying, "Reserve this case for 50 percent disability."

THE COURT: I don't find that to be sufficient basis for that form of a question to this doctor, without any further discovery.

MR. TESTA: I think the jury should be instructed to disregard it then.

MR. SHIELDS: I agree with it.

THE COURT: That was the purpose of me asking it. I am going to direct that they keep in mind that this doctor has testified he made no such confidential report and as far as anybody saying that he had five times this disability that this doctor has prescribed, it doesn't refer to him.

MR. LASOFF: All right.

Service of 2 copies of this within
APPENDIX is admitted this
6TH day of DECEMBER 1974

ATTORNEY FOR PLAINTIFF-APPELLEE

ATTORNEY FOR DEFENDANT & THIRD-PARTY
PLAINTIFF-APPELLEE

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